



**DEVELOPING THE RULE OF LAW IN UKRAINE:
ACHIEVEMENTS, IMPACTS, AND CHALLENGES**

**A Retrospective of Lessons Learned
for the Donor Community
Ten Years after Independence**

**Prepared for the E&E Bureau
USAID**

**by
Mark Dietrich
Richard Blue
Management Systems International**

Draft June 2002

TABLE OF CONTENTS

EXECUTIVE SUMMARY	ii
I. INTRODUCTION	1
A. Goals, Scope, and Methodology	1
B. Historical and Political Context	2
II. THE LEGISLATIVE FRAMEWORK	5
A. Current Status.....	5
B. Donor Interventions and Impact.....	9
III. JUDICIAL REFORM	12
A. Current Status.....	12
B. Donor Interventions and Impact.....	21
IV. ACCESS TO JUSTICE	26
A. Developments since Independence.....	26
B. Donor Interventions and Impact.....	28
V. LEGAL EDUCATION.....	34
A. Current Status.....	34
B. Donor Interventions and Impact.....	37
VI. LESSONS LEARNED FOR THE DONOR COMMUNITY	38
A. Sequencing and Targeting.....	39
B. Modalities	41
C. Donor Coordination.....	43
D. Other Lessons Learned	43
E. Conclusions: Catalysts and “Political Will”	44
Annex A: Assistance Providers	46
Annex B: Ukraine Rule of Law Assessment – Persons Interviewed	51
Annex C: Ukraine Rule of Law Assessment – Documents Reviewed.....	58
Annex D: Judiciary in Ukraine.....	62
Annex E: Budget Allocations	67

EXECUTIVE SUMMARY

I. INTRODUCTION

Most western observers anticipated that the newly independent Ukraine would rapidly develop into an open, democratic society based on a free market economy and the rule of law. Ten years later it is clear that, while some important progress has been made, the expectations of a quick and easy transition to western style democracy have not generally been met.

USAID has been providing assistance to the development of the rule of law since 1993. In the early years, that assistance was largely of a top-down nature: helping to draft the necessary legislative framework, providing support to the judiciary, etc. Frustration with the slow pace of reform emerged in the mid-1990s, and by 1999 USAID and others had largely shifted their emphasis, and began providing more support to grassroots and advocacy programs.

The following report summarizes these and other efforts to support legal and judicial reform in Ukraine and seeks to provide some lessons learned to be applied in the design of future programs.

II. LEGISLATIVE FRAMEWORK

Ukraine has largely re-vamped its legislative framework, having adopted a new constitution in 1996, and enacted a new criminal code, a new election law, and a new land code, amongst others. Even after the passage of ten years, however, much important work remains, including the need to adopt a new civil code, a modern administrative code, and revisions to the various procedural codes. In addition, the vast array of new legislation needs to be harmonized and streamlined. Legislative drafting skills remain poor, and the process of drafting laws is still largely non-transparent.

USAID, through the Parliamentary Development Project (PDP) of Indiana University, has worked to enhance the capacity of the parliament since 1994. PDP's efforts at parliamentary and legislative reform, however, were largely constrained by Communist Party control of the leadership until early 2000. Since that time, PDP has shown some greater impact, including helping to increase the openness and accessibility of the leadership, and increasing transparency.

USAID, through its rule of law contractor ARD/Checchi, has also provided advice on specific pieces of legislation, as well as the constitution. USAID played a particularly important role in facilitating the adoption of the constitution, more by acting as a disinterested broker than by providing substantive advice. It also supported extensive work on the civil code, which has had a less fruitful result. The assistance provided to a drafting commission was valued, a good draft law emerged, but the draft was extensively amended by the Rada, and then vetoed by the president.

One frequently noted weakness in American assistance in this area is a perceived attitude that "we know better" when in fact we do not. Ukrainians and longtime American experts in the country point to the bankruptcy law as an example. During the drafting process, USAID brought in many specialists and a law was prepared, but according to one professor, it is rarely used because it is too complex. Similarly, an American expert with little knowledge of the civil law had a major role in writing a law on secured transactions. The law was considered "beautiful," but it was never passed. Clearly, drafting projects need to be closely tied to Ukrainian partners, with an eye not to American law but to civil law and European integration. Facilitating a reform process, serving as a neutral broker, offering choices and providing information may all be more successful strategies for legal reform than drafting the perfect law

that does not then get passed or that gets passed and is never implemented. USAID's role in facilitating consensus on a new constitution is one testament to potential of this approach.

III. JUDICIAL REFORM

The Ukrainian judiciary is in a state of flux, given the passage of a new law on the judiciary on February 7, 2002 that will go into effect on June 1, 2002. Much will depend on how this new law is implemented.

In the meantime, the judiciary in Ukraine is up against some serious challenges. The most important one is that while society has continued to place increased demands on the judiciary, the government has not commensurately increased the resources at its disposal. Citizens are turning to the courts more frequently to assert both civil and property rights, crime rates have increased, and the courts are now adjudicating matters (such as administrative and labor disputes) that were previously handled by other state agencies. While caseloads have grown tremendously, financial support has remained essential static.

The consequences of the failure of the state to sufficiently support the judiciary include: judicial reliance on local authorities for support, with the concomitant lessening of judicial independence in matters in which the local authorities have an interest; an increase in corrupt practices; poor working conditions; slower processing of cases; and insufficient training and access to information, resulting in poor decision-making.

Despite these problems, there have been some important changes, including a shift in the balance of power among the judges, lawyers, and prosecutors. Now, only judges, not prosecutors, can issue arrest warrants. Defense attorneys reported that in general the playing field is more level. Previously, the prosecutor was 99.9 % sure that he would win, but now, lawyers say, judges are feeling freer to come up with not guilty verdicts, and are also now ordering the release of illegally detained defendants.

The higher level courts are taking decisions that run counter to the interests of the state. The Constitutional Court, for example, has invalidated the *propiska* (internal registration) requirement, enabling people to move freely about the country and live where they choose. In another case, the Constitutional Court ruled that the president did not have the power to appoint deputy heads of local administrations. The Supreme Court has overruled decisions by the Central Election Commission, including – in a matter strongly criticized by President Kuchma – ordering the registration of seven candidates for president. The Court also found that an order to re-arrest Yulia Tymoshenko, a political opponent of the president and a minister in the Yushchenko government who had been charged with corruption, was illegal. In April 2001, the Supreme Court plenum issued a guiding opinion on the question of moral damages, instructing courts to apply the European Convention to limit claims for huge amounts of damages against journalists. It is noteworthy that a USAID grantee, IREX/Pro Media, worked with the Court for two years to help convince them to adopt these new standards and issue their guiding opinion. The end result of this work and of the Supreme Court decision is that it is more difficult to plaintiffs to use the courts to close down troublesome newspapers. It was also a Supreme Court guiding opinion that instructed the lower courts to apply directly the procedural protections contained in the 1996 constitution – a directive that the courts are taking seriously.

Despite the increasing independence of the higher courts, there are still serious limits to judicial independence. Most observers believe that if a case involves important political or financial interests, the courts will feel obligated to find in favor of the state or the oligarchs. Another serious and lingering problem is the difficulty of getting judicial decisions enforced.

Between 1993 and 1999, ARD/Checchi purchased computers for the courts, brought numerous judges to the U.S. for training programs, helped to build libraries in the Higher Arbitration and Supreme Courts, and also helped those courts to conduct training programs and develop judicial training centers. Most judges interviewed felt that this program had been effective, and that it should have been continued because it was providing a good and useful service to the judiciary, and doing things for it that the Ukrainian government either could not or would not do. At the same time that the ARD/Checchi contract was coming up for renewal, however, USAID was becoming more and more frustrated with the pace of judicial reform, especially regarding the failure of Ukraine to adopt a new law on the courts. It decided not to renew the contract, pending the passage of a new law. This decision was criticized by many who felt that USAID could have continued to provide useful assistance even absent a new law, and that USAID could have had a greater positive impact on the law if it had had a full judicial reform program in place.

IV. ACCESS TO JUSTICE

Perhaps the earliest effort to develop a bottom-up, grassroots program in Ukraine was through the support of the American Bar Association's Central and East European Law Initiative (CEELI) for Environmental Public Advocacy Centers (EPACs), established in 1994. USAID also supported the efforts of the American Center for International Labor Solidarity (ACILS) (active in Ukraine from 1994 – 99) to provide legal representation for workers in Ukraine. USAID has also been a long-time supporter of IREX/Pro Media, which has helped to defend journalists in Ukraine since 1994. After USAID decided to pursue a more grassroots approach to legal reform in Ukraine in 1999, it extend its support for these types of programs, working on human rights issues more broadly. Each of these programs has been successful. They have provided meaningful assistance to Ukrainian citizens, and have helped to force the judicial system to do the job it is supposed to do, of protecting individual rights and of forcing the state, as well as the citizen, to comply with the law.

V. LEGAL EDUCATION

Legal education in Ukraine has undergone some significant shifts since the demise of the Soviet Union, but also continues to face some important problems. The most important change has been the increase in popularity of legal education, with a concomitant increase in the number of law schools. This in turn has presented a challenge to Ukraine in how it will monitor the quality of legal education, and ultimately the quality of the lawyers who practice there.

Although Ukraine's law schools have been criticized for their conservatism, it must be noted that many new topics, such as business and commercial law, human rights, ethics, and international treaties, are being taught, albeit mostly as electives. Another criticism is that the teaching methodology is largely lecture-based, although some schools, with donor support, have begun to introduce clinical legal education programs.

The donor community, and USAID in particular, has been hesitant to work on legal education reform. USAID, understandably, has been daunted by the perceived conservatism of the law schools and the long-term nature of the work. The only real work that USAID has supported has been on clinical legal education, which it sees more as a means of supporting access to justice rather than as a legal reform program. Ignoring the legal education system, however, can undercut all other efforts at legal reform. If, for example, a student can gain admission or good grades at law school based on corruption or nepotism, how can he be expected to act ethically when he becomes a lawyer, judge or prosecutor?

VI. LESSONS LEARNED

Domestic political decisions are the most important catalysts – and impediments – to reform. Ukraine is now engaged in a struggle between its stated policy goal of integration into European political and economic structures and the reality of its current Potemkin-democracy marked by human rights abuses. Some of the political advances, including the adoption of the 1996 constitution and the ratification of the European Convention, are quite real, and are provoking enormous change in Ukraine. As one judge said, “The drive to be a part of Europe is a major factor in judicial development and decisions.” It is not surprising that the most successful donor programs are those advocacy projects that are forcing Ukraine to live up to its international commitments.

“Political will,” however, is not the sine qua non of a law reform program. The presence or absence of political will can merely define the scope and expectations of such a program. Even without political will, programs can lay the groundwork for change by helping to develop demand and by providing moral and financial support to reformers. Unfortunately, host country “political will” does not always match up to donor country “political will.” The early years of Ukrainian independence were met not only with euphoria in the west, but also a great deal of funding. Ukraine was not ready, either politically or institutionally, to absorb all the money that came its way. This resulted in some poor developmental decisions that were driven by funding rather than by need. Now, however, that Ukraine may be able to absorb more money and the donor community better understands how to spend the money, there is less political will on the part of the donor countries to make the requisite investment. Moreover, based on the outcome of the parliamentary elections, there may be greater host country political will than in the past. Additionally, the donor community needs to be more nimble to take advantage of political openings as they arise, such as the changeover in the Rada in 2000 or the passage of the “small judicial reform.” Given the necessary contracting regulations, this may be a tall order, but perhaps some means can be established to secure funds to enable a rapid response to political development in country.

The evidence clearly indicates that since independence Ukraine has made progress in all four areas of law reform: legislative framework, judicial reform, access to justice, and legal education. Moreover, this progress has accelerated since the 1996 constitution, the adoption of the European Convention in July 1997, and the parliamentary changeover in January 2000. Donor organizations have made important contributions to the advances that have been made, although the assistance could have been more effective. The design of future programs should bear in mind the following lessons learned:

- Programs that are true partnerships with Ukrainian reformers work best. While everyone appreciates the opportunity to learn about Western systems, and listen to American and European experts, the donors often exhibited a lack of knowledge and respect for Ukrainian experience and conditions. Too much of foreign assistance was seen as a one way street, a lecture rather than a dialogue, a handout rather than a partnership. It is to the donor community’s credit that there now seems to be much more emphasis on true partnership, with Ukrainian partners at all levels shouldering a much greater share of the burden and responsibility for effective promotion of reform.
- Programs that are tied to local political advances or to international standards have a better chance of success. Much of the success of the advocacy programs have been tied to Ukraine’s adoption of a new constitution and accession to the Council of Europe. Likewise, the PDP program seems to have enjoyed greater success after the changeover in parliament in early 2000.
- Conditions to reform programs must be carefully structured and broadly disseminated. This is of especial concern regarding the law on the judiciary, discussed above.

- Do not structure programs in the expectation of short-term results. Developing the rule of law is long-term work. These programs are helping to change mindsets and societies, which may take a generation or more. Progress, for example, cannot be measured by the passage of one law: it will, in fact, take years to see how a law is implemented and whether it had the intended results. In terms of “institution building,” it is important for the donor organizations to understand that if they are going to help to create an NGO, they had better be prepared to stand by it for long time. Self-sufficiency is not likely to occur soon, given the realities of the Ukrainian economy and laws.
- Programs that foster dependency will not succeed in the long-term. It is up to the government to train judges and provide them with books, computers, and other equipment. Donor assistance should be ancillary and designed in a way that includes a transition to and a commitment from the host government. We cannot “do it for them,” and we should look for financial support to flow out of political will.
- Investments in generating demand and in advocacy programs do have impact, especially when focused on critical issues such as press freedom, exploitation of women, regulation of small and medium enterprises and environmental degradation. Over time, these “bottom up” programs can put so much pressure on the judicial system that the system itself starts to respond to the needs of a democratic and free market society. In other words, while such bottom up programs can look like “fairy dust” when viewed in isolation, they can have important impact over time and, taken together, can promote system change.
- A bottom up strategy may be virtually the only option for rule of law engagement when political commitment to structural reform of the judiciary is very weak or non-existent. However, it is an incomplete strategy if the expectation is for quick results in establishing a modern legislative framework and an effective and fair judicial process. Ways must be found to stay engaged in “top down” reform relationships, even in the absence of reform. Breaking relationships with the judiciary and working only outside the system is likely to be inadequate and will miss opportunities to affect thinking as conditions begin to change. At the point that change occurs, donors might then be poorly placed to take advantage of it.

I. INTRODUCTION

A. Goals, Scope, and Methodology

The following report, commissioned by the United States Agency for International Development (USAID), reviews the progress towards developing the rule of law in Ukraine. In particular, the report seeks to determine the effectiveness of ROL assistance in promoting reform in the law and legal institutions in Ukraine over the past ten years; to identify the various factors and conditions which have enhanced or limited the effectiveness of ROL assistance; and to determine the relative effectiveness of various types of ROL assistance in strengthening law and legal institutions.

The findings and conclusions generated as the result of this assessment are intended to assist rule of law strategists and mission DG officers to formulate more effective rule of law strategies, both regionally and on a country-specific basis, based on experienced gained and lessons learned from past programming in the region. The principal aim of the assessment is to determine what has worked and what has not worked and why, and whether certain means of delivering assistance have been more effective than others in achieving change in participants and institutions in the legal system.

This report is one of a series on the impact of legal and judicial reform assistance in Eastern Europe and Eurasia. Reports have been completed covering rule of law programming in Armenia, Kazakhstan, Kyrgyzstan, and Uzbekistan, and additional country reports are planned. These reports will be consolidated into a final report that will summarize lessons learned from the 10 years of assistance in the region.

“Rule of law” is a broad term, subject to multiple definitions. For the purposes of this report, the team has investigated the following:

- The legal framework: What laws essential to the functioning of a free-market democracy have been passed, and which remain to be enacted? The team has also sought to determine, to the limited extent possible, how the legislative framework is working in practice: what do the lawyers and judges who are implementing it think? What are the gaps in practice? The team has also examined the process of law making, in effort to determine how transparent and effective it is, and what role the donor organizations have played in molding the legislative framework.
- Legal Sector Institutions: How has the role of the judiciary in Ukraine evolved since independence? Has it been given greater powers, and how is it exercising those powers? Is it both more independent and more accountable? What is the level of support that the government is providing to the judiciary? Finally, how has the donor community contributed to the process, if at all, of developing the judiciary as an independent branch of power in Ukraine?
- Access to justice: How has the citizen’s usage of the legal system changed? How and why are citizens attaining their right to justice? How has the profession of the lawyer changed? What are the avenues of access to justice, and what are the impediments? How has the donor community improved access to justice, and how has it helped to use the legal system as a means for bringing about societal change?
- Legal education: How and what is being taught in the law schools of Ukraine today? How does that differ from the past? Again, what, if any, have been the contributions of the donor community?

In its efforts to answer to questions, the team has sought to identify the causations of change, and to understand the reform process from the perspective of Ukraine's unique history.

Regarding methodology, the team followed a system developed by Management Systems International (MSI) through which key informants were asked open-ended, non-leading questions designed to determine where change had occurred in the legal framework and legal institutions over the period and the extent to which, for better or worse, donor assistance programs were associated with such changes. Interviewees were also asked whether there had been opportunities at any time throughout the period when donor rule of law assistance could have made a greater impact or been more effective in supporting change. To a certain extent, the team also explored significant USAID supported assistance activities to determine their intended and actual results. The primary rule of law programs that USAID has supported are: the ARD/Checchi Rule of Law Consortium (ARD/C) project, which worked in Ukraine from 1993 – 1999, with funding of over \$ 14 million; Indiana University's Parliamentary Development Project (PDP), active from 1994 to the present, with funding through 2001 of approximately \$ 6.8 million; and the American Bar Association's Central and East European Law Initiative (CEELI), working in Ukraine from 1992 to the present, with funding through 2001 of approximately \$ 4.8 million. A description of USAID programs, their funding, and other donor-supported rule of law programs is annexed as Exhibit A.

This report, however, is not, and was not intended to be, a full evaluation of those programs, but rather is intended to identify more broad lessons learned based on the experiences of those, and other programs. In addition, although suggestions for current programs were raised and are discussed, this report does not purport to be a full needs assessment, although it should obviously be useful to both planners and implementers as they design future rule of law programs in Ukraine.

The team spent over two weeks in Ukraine (February 4 – 20, 2002), visiting Kyiv, Kharkiv, Ternopil, and L'viv, and interviewing over 80 judges, lawyers, law professors, NGO leaders, program implementers, and government officials. A list of those interviewed is annexed as Exhibit B. The team sought to interview as diverse a group as possible. The persons to be interviewed were determined pursuant to consultations with the Mission and program implementers, but the team also used its own contacts, and added additional names during the course of the visit. In order to protect sources, the report does not include specific attributions. The team also sought to base its findings on statistics and on previous studies of the Ukrainian legal system. A list of the documents reviewed is annexed as Exhibit C. Comments and corrections on the team's findings are encouraged, and should be submitted to Lynn Carter of MSI (lcarter@msi-inc.com).

B. Historical and Political Context

Ukraine has endured a difficult history, and has seldom experienced independence, let alone democracy. The country has been divided between east and west, and has suffered invasions from both since the middle ages through the Second World War. The western part of the country has frequently been dominated by Poland and Lithuania, while eastern Ukraine was for centuries ruled by czarist Russia. The divide between east and west persists in the post-communist period: the population in the west is largely Catholic and Ukrainian speaking, while in the east it is Orthodox and Russian speaking. The nation, although large – indeed, the second largest in Europe, with a population of over 49 million – did not know independence (except for a brief period between the wars) until the collapse of the Soviet Union in 1991.

1. The Soviet Legal Legacy

Communist Russia knew no rule of law, as we conceive of it today: “As an authoritarian state with a largely state-owned and administered economy, the USSR treated law as simply one of a number

of instruments of rule, and not even as the dominant one. Both political decisions and administrative regulations . . . took precedence over law, and even the application of regulations often took an ad hoc form and was strongly influenced by personal relationships.”¹

This meant that, although laws that enshrined fundamental human rights may have been well crafted, they either were not applied, or were applied selectively. The judiciary knew little independence. Judges were dependent on local Communist Party (CP) bosses, and decisions concerning politically sensitive cases were dictated by the party chiefs to the courts through a system known as “telephone justice.” As one observer has noted, “During the Soviet era, the law of command, as manifested through ‘telephonic justice,’ was preeminent. During that time, the judge was literally commanded to follow the decisions of the local Communist Party bosses and procurators; such a system relegated judges and defense attorneys, both employees of the state, to mere administrative roles.”²

In short, the baseline for legal reform in Ukraine, upon attaining its independence with the collapse of the Soviet Union in December 1991, was extraordinarily low.

2. Ten Years of Unsteady Transition

The establishment of an independent Ukraine was accompanied by high expectations for a rapid transition to a more free and prosperous society. Those expectations, unfortunately, have gone largely unfulfilled. As in most of the rest of the former Soviet Union, poverty has increased, and life expectancy rates have decreased.³ According to a recent national survey, most people would prefer “a strong leader who could bring order” over the kind of democracy now practiced in Ukraine.⁴ Several of those interviewed for this report felt that by 1998 the democratic period had ended, and since then the Ukrainian government has become more authoritarian, less transparent, and infinitely more corrupt.

What happened to the promise and enthusiasm of the early years of independence?

The current and past U.S. ambassadors to Ukraine have written that the problem, in part, lies with an underestimation of the task that Ukraine faced in 1991. As they point out, Ukraine (as well as the other countries of the former Soviet Union) was facing a tripartite transition, “from regional outpost to nation-state, from authoritarianism to democracy, and from command economy to market economy—simultaneously.”⁵ While Ukraine indeed has developed into a viable nation-state, both the new economy and a more democratic polity have been slow to emerge.

As in the other former Soviet states, the end of socialism brought a violent contraction to the economy. According to Pascual and Pifer, “by 1999, GDP had collapsed by 60 percent.”⁶ State assets, moreover, were “privatized” and put into the hands of what came to be known as the oligarchs, many of whom were apparatchiks from the Soviet regime. Corruption and high taxes drove a large segment of the

¹ P. Solomon and T. Foglesong, Courts and Transition in Russia: the Challenge of Judicial Reform (Westview 2000), p. 4.

² B. Futey, “The Prospects of the Judiciary Emerging as a Co-Equal Branch of Government in Ukraine,” Comments at the Ukrainian Free University, Munich, May 28 – 29, 1999.

³ “In 1998 one in five people in the region survived on less than U.S. \$ 2.15 a day, a standard poverty line. A decade before, fewer than one in 25 lived in such absolute poverty.” Transition: The First Ten Years (The World Bank, Washington, D.C. 2002), p. xiii.

⁴ Surveys conducted by the Ukrainian National Academy of Sciences in collaboration with the Democracy Initiatives Foundation and SOCIS between 1994 and 2001.

⁵ C. Pascual and S. Pifer, “Ukraine’s Bid for a Decisive Place in History,” The Washington Quarterly, (Winter 2002), p. 177.

⁶ Id., p. 179.

economy underground. Due to high inflation (377 %, for example, in 1995), savings disappeared, and pension payments became nearly meaningless.

The stresses of this period inevitably generated a variety of survival and coping strategies among different sectors of Ukrainian society. Depending on where one sat in 1991, some became reformers, or NGO leaders, or political activists, joining the “reform industry” that was being promoted and financed by the foreign assistance community. Others hung on to their government jobs or jobs in state run factories, making a living through petty bribery and taking outside jobs. Smart, clever people in Soviet era leadership positions were sometimes able to move to the new economic and democratic arena without missing a beat, making money and gaining new political power as they went. Many of the younger people left the country to find work elsewhere; Ukraine’s population shrunk by almost a million people. Large numbers of citizens were marginalized and reduced to selling pencils and cigarettes to survive.

On the political front, a procrastinating, patchwork, half way approach to reform characterized the legislative and policy process throughout much of the 1990s, reflecting the lack of a political consensus on the reform agenda. The first president of Ukraine, Leonid Kravchuk, was a former CP boss, with little enthusiasm for either economic or political reform. Although an apparent reformer, Leonid Kuchma, was elected president in 1994, the still formidable former communists controlled the Rada until 2000. President Kuchma found himself relying increasingly on rule by decree, with growing support from the Ukrainian “new men,” the infamous oligarchs who were learning to play pressure politics in the new, half-baked democratic arena. By 2000, Ukraine had all the appearance of a “stuck state”, neither able to move backwards or forwards, simply treading water as the economic and social condition of the country continued to decline.

Ukraine had taken one important step forward in 1996 when, with the assistance of USAID and others in the donor community (discussed *infra*), it finally adopted its first post-Soviet constitution. The 1996 constitution is a watershed document. Although criticized by some, it provides for important procedural rights for criminal defendants, and guarantees the freedom of speech, movement, and ownership of property, among other rights. It also prioritized international treaties over Ukrainian laws, and mandated the creation of a constitutional court. These treaty obligations, in particular regarding the European Convention on the Protection of Human Rights and Fundamental Freedoms (the “European Convention”), and the Constitutional Court (CC) have been – as discussed below – key catalysts in Ukraine’s fitful progress towards democracy and the rule of law.

The situation in the Rada continued to be a problem, however. The CP essentially won the first two parliamentary elections, and was able to counter most reformist initiatives. The legislative output was, accordingly, largely devoted to amending the body of law inherited from the Soviet period. Lack of political power was not the only problem. Many of the members (MPs) understood, according to one, “the need to dismantle the legal structure of state ownership and dominance, but we failed to do this . . . we lacked the expertise.” He described the Rada members as “first grade students trying to write a novel.” One consequence of this failure to develop a systematic and enforceable economic and financial legal framework was the development of atavistic, rent-seeking behavior. According to another respondent, “People from the old regime who were in positions of administrative power over old economic assets turned themselves into wealthy people, oligarchs, by buying state assets, assuming ownership, and then selling the assets cheap, often to foreign companies.”

Although non-CP parties won the majority of the seats to the Rada in the 1998 elections, due to bickering amongst the majority, the CP was able to retain the parliamentary levers of power. It was not until January 2000 that the “reformists” finally took control of the parliamentary committees and power structures. Meanwhile, a reform oriented prime minister, Viktor Yushchenko, appointed in late 1999,

made tough financial and fiscal policy decisions, enabling stalled IMF loans to restart. In 2000, the economy began to stabilize, and GDP grew by 5.8 %. Things were starting to look up for Ukraine.

Unfortunately, September 2000 saw the disappearance and presumed murder of the journalist Heorhiy Gongadze, a harsh critic of President Kuchma. The fragile coalition of Kuchma supporters and reformers began to disintegrate with public outcry about the Gongadze disappearance. The situation worsened when the Melenychenko tapes surfaced, indicating that the President and some of his advisors may have been involved in Gongadze's disappearance. Also in 2000, the president – tracking the example set by his colleagues in Central Asia – introduced a referendum that would have increased his powers. Although the proposals passed, the CC invalidated two of them, and the Rada has thus far refused to confirm the vote on the others. The next blow was a no-confidence vote against Yushchenko, who was removed from office in spring 2001. Allegations of government involvement in the murder of another journalist and of wide ranging suppression of opposition media continued to grow in 2001. President Kuchma was becoming a beleaguered leader, and renewed questions about the effectiveness of the rule of law in Ukraine were being raised both in and outside Ukraine. The democracy and rule of law ratings in the Freedom House Nations in Transit reports, for example, have either remained static or decreased. The U.S. Department of State Report on Human Rights for 2001 concluded that “the Government’s human rights record was poor.”

These concerns are reflected in the available polling data.⁷ In 1995, 52 % of those surveyed reported that the legal system was “insufficient” to protect their rights and interests. By 2000, 50 % of those polled were still giving the same response. Regarding the observance of human rights, 53 % found that Ukraine’s efforts were “insufficient” in 1995, and grew to 64 % and 66 % in 2000 and 2001, respectively. Answers to questions about political freedoms such as speech, conscience, and movement showed some improvement in the percent of positive responses between 1995 and 2000, but the percent saying that protection for political freedoms was insufficient also increased from 18 % in 1995 to 27 % in 2001.

Ukrainians have also been asked since 1994 whether protection from the “whims of bureaucrats and bodies of power” had gotten significantly worse, somewhat worse, no change, had somewhat improved or had significantly improved. No Ukrainian was able to say over the period from 1994 to 2000 that significant improvement had occurred. A very small group, 2 %, since 1998 said things had somewhat improved. The percent reporting no change increased from 30 to 40 % over the time period, and the percent saying that things were significantly worse had dropped from 46 to 33 %. Ukrainians seem to be saying, for the most part, things are not getting worse, but any change for the better is only marginal and, probably, very fragile.

II. THE LEGISLATIVE FRAMEWORK

A. Current Status

1. Substance

Due to the political uncertainties described above, the legislative framework has made only fitful progress towards completion in Ukraine. As noted, the passage of the constitution in 1996 was a vital step forward. One knowledgeable American lawyer said, “Getting the constitution through was important . . . these big laws are documents that change practice and perspective. They are not hollow documents. They are referenced.” This observation was underscored by judges we spoke with who made frequent

⁷ Surveys conducted by the Ukrainian National Academy of Sciences in collaboration with the Democracy Initiatives Foundation and SOCIS between 1994 and 2001.

references back to the constitution. A regional chief judge of an appellate court said, for example, “When there is a contradiction or confusion in the statute or a decree, we look to the constitution to decide.” Not all agree that the constitution is good document, though. One law professor opined that the constitution is poorly written, contains a lot of socialist language, and does not conform to reality. For the most part, however, judges and lawyers have succeeded in making good use of the constitution as a viable set of legal norms and standards against which other acts and decrees must be judged.

Although the legislative output of the Rada had been prodigious (with nearly 6,000 pieces of legislation passed), much of this work in the early years did not address the need for fundamental structural change. Work had been going on for some years on a new civil code, a new criminal code, and other much needed framework legislation, but the political impasse prevented these new laws from making it past the first readings. Only after January 2000 did it become possible to harvest the work that had been done, and a spate of major laws were voted out of the Rada. Principle among these were:

- A new Criminal Code was passed and signed. This law gives judges rather than prosecutors the authority to issue arrest and search warrants. It also limits to some degree the oversight authority of the prosecutor’s office.
- An Election Law was passed, strengthening the Election Commission. Many feel that this law will need to be revisited after the March 2002 parliamentary elections.
- A Land Code was passed and signed. The consideration of this law prompted a revolt in the Rada by the CP delegates, who smashed the tallying machine in an attempt to prevent a vote. This law is a major step toward creating a legal land market and divisible property rights.
- A new and simplified licensing law is being enforced, making it much easier to obtain licenses to do business.
- A bankruptcy statute, although heavily criticized, is in place.
- A judicial reform act was passed, discussed in greater detail below.
- A new Civil Code was passed but vetoed by President Kuchma because of concerns that it was not sufficiently market-oriented.

Despite these accomplishments, many key pieces of legislation remain to be passed. Foremost among these is a Civil Code that will pass presidential muster. Other fundamental laws that must be enacted include:

- A modern administrative code that will serve not as means for fining citizens for misdemeanor type of offences, but that will be a tool for forcing state agencies to act when they have a duty to respond to citizen requests. This is a priority for the Council of Europe (COE).
- Procedural codes to cover civil, commercial, criminal, and administrative matters. Although the existing procedural codes have been subject to extensive revision, more fundamental changes are required if Ukraine is, for example, to use jury trials as mandated by the constitution. These procedural codes will also be vital in delineating the different powers of judges, prosecutors, and private attorneys.
- A new tax code. One parliamentary leader was emphatic on this, saying, “This must be passed. It is critical for finance, micro-finance and credit, for political stability and for citizen trust and

functioning in relation to the state.” A foreign lawyer said that the tax administration is “a country unto its own” in need of reform.

- Development of rules of procedure for the Rada. Currently the Rada is operating with 1994 rules, which one MP described as “not adequate . . . we need to move toward the European tradition of parliamentary organization.”
- Very controversial laws on the powers of the executive and the cabinet have been drafted and may be taken up in the next convocation.
- A law on not-for-profit organizations.
- The labor code, which dates back to the Soviet Union, has been amended, but needs to be modernized consistent with a market economy.
- Other basic laws that affect the business climate, on intellectual property, joint stock companies, and mortgages, await action.

In addition to the need to pass new laws, current legislation must be harmonized and rationalized. Many delegates who come from a legal education background state that Ukraine’s unwieldy collection of laws, decrees, and regulatory edicts have created a shaky edifice of unparalleled confusion. According to one, “We have passed an immense number of laws, but they are not effective because they are undercut by other contradictory laws. When there are all these gaps, they are filled in by officials and because of this there is no trust by the people. They believe only money and power work in Ukraine.”⁸

The lack of consistency among laws is also of concern to NGO leaders. For one, the solution was simple: “There should be a moratorium on all legislation for several years while we sort out the mess.” He gave examples of contradictions between the NGO law, which permits NGOs to create non-profit entities and earn money for the NGO, and a tax administration decree, which says that any income earned is profit, and subject to tax. Another leader working with journalists said there are four different definitions of defamation in four different laws dealing with various aspects of the media.

Judges expressed varying reactions to these apparent contradictions and inconsistencies. The chief judge of one appellate court said it was not a problem: “We just turn to the constitution and pick the law or definition which best fits the constitution.” Another agreed that it was hard for judges to deal with inconsistencies, gaps and situations not covered by the law. But, he said, “Judges are supposed to know the hierarchy: first follow the constitution, then the laws, then the decrees, and then the regulations.”

It is difficult to make a reasoned judgment on how bad the situation arising from inconsistencies and gaps really is. It is certainly easier for those who have access to the commercially available legislative databases. One assistance provider said it is difficult, “But if you follow all the onerous rules, if you track the legislation, and if you keep all your ducks in a row, you can work within the legislative framework.”

⁸ This respondent has developed a proposal for his recently established NGO which calls for \$19 million, a panel of 18 academically qualified legal experts from the Rada, the government and outside, who would in two years undertake to translate all European Union (EU) laws into Ukrainian, then harmonize all Ukrainian legislation with the EU and internally, consolidating the law into 51 comprehensive codes. For this respondent, creating an independent court system will not solve the rule of law problem if the courts must continue to interpret and apply such a confusing and inconsistent body of law.

Foreign business lawyers echoed this, saying it was difficult, but that they could work within the framework.⁹

2. The Drafting Process

While it was beyond the capacity of the team to evaluate the quality of the individual laws that have been passed, most of those interviewed felt that the technical level of legislative drafting is very poor. According to these respondents, many laws lack sections that define terms, are internally inconsistent, are convoluted, and often fail to achieve the policy goal that the law was intended to address.

Most laws that are considered are submitted by the MPs. The following chart, based on information provided by the Parliamentary Development Program (PDP), shows the statistics, according to parliamentary plenary session:

Sources of Laws Considered

Plenary	1	2	3	4	5	6	7	8	Total
MPs	55	138	276	187	384	266	306	246	1,858
Exec.	13	125	232	129	165	92	101	158	1,015

Sources of Laws Passed

Plenary	1	2	3	4	5	6	7	8	Total
MPs	39	88	169	93	224	141	169	121	1,044
Exec.	7	69	145	71	117	65	76	102	652

Most of the important laws, and the higher percentage of laws that are passed, however, are submitted by the president or the cabinet of ministers.

The laws that are drafted by the government or the president are typically drafted by the bureaucrats within the government. The MOJ, with 10 drafting departments with over 100 employees, is supposed to be the home of legislative drafting expertise and is responsible for reviewing all draft laws and coordinating the process. For important legislation, the government may convene a panel of experts to draft the law. These legislative drafting commissions are often funded by the donor community and include foreign experts. Reportedly, many of the drafts that come out of these commissions are of a very high quality. The problem is when the draft is submitted to the Rada, politics come into play, and the original draft is changed beyond recognition, in the interests of individual or special interests, and the original purpose of the law is undercut. As discussed in the next section, this is exactly what happened with the civil code. The converse also sometimes occurs: the Rada passes a law, which then legal experts “clean up” before the President signs it. Needless to say, the opportunity for mischief in this regard is also great.

In any event, Rada members and their staffs are not sufficiently versed in legislative drafting skills. Relatively few of the 450 members of the Rada have any legal background. According to one respondent, only 10 persons came in to the parliament with legal training and experience, while others took “night school” to get their legal certification. There is, however, a Legal Drafting Center in the Rada Secretariat, which PDP is working with to improve its skills and competence, with the hope that eventually it would become the place where MPs would go to enlist legal expertise in the drafting process. The British Department for International Development (DFID) is also working to teach legislative drafting skills to staff and government officials.

⁹ This is different than in some other countries, such as Romania, where lawyers report that it is nearly impossible to comply with the laws and regulations because they are so contradictory.

The Rada faces other problems in terms of lack of coordination and communication within its various departments, exacerbated by a lack of a modern information technology and management system.

The technical weaknesses in the Ukrainian law drafting process would be more readily addressed if there were a greater consensus on the fundamentals of what are or should be the underlying principles of the modern Ukrainian state. Ukrainians point to the dramatic conflict between the communists and the social democrats over the control of the Rada and subsequently the passing of the Land Law. Communist delegates simply did not accept the fundamental idea that land is a commodity within the structure of private ownership and a market economy. Unfortunately, even as it appears that the fundamental contest between free market reformers and old socialists has been won by the former, there still is no systematic policy vision from the government driving the reform process. According to foreign lawyers working in Ukraine, there is no “big picture” policy framework in place, and this leads to the kind of legislative inconsistencies noted above. Another respondent said, “laws are not being written for the larger good, but to solve the problems of individuals who are funding the parliamentary campaigns.” Another assistance provider reported, “We get silence when we ask what the purpose of a law is.” On a more micro-level, it was reported that neither the Rada nor the drafting commissions nor the government does enough work assessing what will need to be done to fully implement a law once it is passed, and that not enough resources are allocated to ensure enforcement, even if the policy goal has been articulated and addressed by the legislation.

The legislative drafting process in Ukraine, as in other countries in the region, also largely ignores another political consideration: consultations with constituents, and the business and NGO communities. Although the drafting commissions described above may include some representatives from these groups, they do not hold public hearings or engage in extensive consultations with those to be effected by the law. The Rada also includes committees that are supposed to hold hearings, and formalize and submit draft legislation, but the practice of holding hearings, while becoming more frequent, is considered a bit of a novelty. The authority of the committees, moreover, remains weak: they have neither investigatory or subpoena powers. As the 2001 Nations in Transit report states, “the decision-making process is more like an undercover fight than a public debate.”¹⁰

B. Donor Interventions and Impact

The most consistent effort to support legislative development has been by PDP, which has been working to enhance the capacity of the Rada since 1994.¹¹ Reportedly, the primary work from 1994 – 98 was informational, with 41 issues of a PDP periodical published for MPs. During this period, PDP also operated a “democracy hotline” through which information pertinent to the legislative process was provided to individual deputies, committee leaders, and the secretariat. In 1998, PDP started to provide more technical support (in terms of re-organizing committee structures and the like), and in 2000 it started to emphasize the promotion of reform legislation. As discussed below, PDP was an important player in getting the constitution adopted and in working on the law on the judiciary. It also participated in developing the law on local self-governance.

Determining the extent to which PDP has strengthened the Rada as an institution or enhanced its capacity proved somewhat elusive, despite extensive interviews with parliamentary leaders and staff. According to the current PDP leadership, the primary impact in this area includes:

¹⁰ P. 393.

¹¹ Before that, the Congressional Research Service had a small project to develop the Rada’s information and research services. Another independent project, later folded in to the PDP, was the Parliamentary Intern program, whereby bright young Ukrainians were selected for one-year internships with the Rada Secretariat or with committees.

- Improved staff quality, and more authority being given to technical staff by MPs.
- More transparency and willingness to hear public views.
- Better and more timely access to information.

It was, however, beyond the capacity of the Team to confirm that the quality of the Rada staff has improved due to PDP's efforts, although its size has increased from about 370 in 1992 to about 900 today.¹² Likewise, claimed greater transparency is also hard to confirm, although some did remark on the fact that the leadership that took over after January 2000 was more open and willing to listen to the views of outsiders. PDP, in this regard, also points to the Rada's website, which now includes draft laws, enacted laws, and roll call votes. In addition, the new leadership is holding weekly press conferences, which PDP has been advocating for since 1996. PDP helped the Rada to develop a manual on the holding of public hearings, but has been somewhat frustrated that the manual has not gotten greater use. While there have been a few more public hearings, their impact on draft legislation remains unclear. The Team came away with a sense that most of the decision-making on the draft legislation is still done behind the scenes, and that the interests of the oligarchs hold greater sway than those of constituents. Nevertheless, a 1997 summary report from the Rada found PDP assistance "effective," and 34% of the deputies surveyed by PDP in 1998 identified it as a "helpful international organization." Nevertheless, the results of PDP's efforts through 2000 seem somewhat intangible, especially when weighed against the over \$5 million that USAID allocated to it during this period. It is evident, however, that PDP has had greater impact since 2000, although funding levels decreased from the high levels of the mid-1990s (see Annex A). Clearly, the catalyst to change has been political events, not USAID financing, and PDP's future effectiveness will likewise also hinge on political developments. The question, however, is whether it was appropriate for USAID to fund a parliamentary program in the amounts that it did in the mid-1990s when the Rada was clearly dominated by the CP. The answer is probably not: in hindsight, more modest funding would have likely produced similar results. This is not to say that a parliamentary program was entirely inappropriate. The improved results today may well be traceable to contacts made in 1994. Nevertheless, the Team found that with more modest funding, PDP and USAID could have maintained contacts and laid the groundwork for the opportunities that became available after the shift in parliamentary power that came in 2000.

USAID (largely through the ARD/C program which brought foreign experts to Ukraine as well as sent some drafting teams to Holland) and other donors have also provided direct assistance in the drafting of specific legislation. Respondents, interestingly, did not note a great deal of donor impact in this regard. On the positive side, unlike in other countries, there was not much carping about, for example, USAID and the World Bank providing contradictory advice on draft legislation. But there was little impact to report.

The most intense effort, noted above, related to the drafting of the civil code. The donor community, including USAID, spent much time and money supporting a drafting commission that prepared a very thoughtful draft, went to Holland to do further work on it, and then submitted it to the Rada. There, the MPs started to pull it apart, resulting in a less than satisfactory bill that was ultimately vetoed. Thus far, the work of the drafting commission and of the donor community has not borne the anticipated fruit. The main benefit of the above process, according to some respondents, is that the local experts made money and learned from the foreign experts. The downside is that the technical drafting is divorced from the political process, resulting in a technically good draft that may never be passed because of political realities. A better result may ensue if MPs or their staffers are included on the drafting

¹² The team conducted interviews in Ukraine just before parliamentary elections, and while the law on the judiciary was being debated. Not surprisingly, MPs and staff were preoccupied and not fully available, something that had been anticipated and discussed when the timing for the visit was set.

commissions or are more aggressively consulted and lobbied during drafting process, before the bill gets to the Rada.

It seems typical of legislative drafting assistance that a good law emerges from the drafting process, but it is either not ultimately adopted, or its value is undercut in the political process. Sometimes, the advice given is not even that good. In one example, an American expert with little knowledge of the civil law had a major role in writing a law on secured transactions. The law was considered “beautiful” by common law standards, but it was never passed, both because it was not based on civil law traditions and because it had been drafted apart from the political process. Clearly, drafting projects need to be closely tied to Ukrainian partners, with one eye on civil law and European integration and another on local political realities.

A related criticism came from one respondent with a background in both the west and Ukraine. “I’m not sure we can effect much change,” he said. “The Ukrainians are swamped with parliamentary practice.” For most foreigners, “the process is going over the heads of the foreigners.” He noted that today, a lot of Ukrainian money is going into the drafting of laws favorable to various interests, especially in the commercial law area. “The MPs know what the international standards are, but they are listening to their business constituencies.” Asked about the practice of doing assessments on draft laws, the respondent commented: “No big impact. By the time the draft law is translated, it’s too late. Or the law sits there for two years. Donors cannot keep up with the sequencing and dynamics of the legislative drafting process.” This skepticism was reinforced by the testimony of a European official who commented: “We wrote 10 concept papers [on various laws], and then found out that no one had copies of them . . . we gave it to a minister, and it disappeared.”

Another concern, noted across the region, is that the laws, no matter how well drafted, are not always enforced properly.¹³ The problem here is twofold. There is an insufficient level of analysis of how changing the law will require a change in how resources are allocated. For example, as discussed in the section on judicial reform below, legislative changes have contributed to the increasing caseload of the courts, by referring matters for adjudication by the courts that were previously handled by government agencies, but the resources allocated to the courts have not kept pace with the increased burdens placed on them. Although the Rada does undertake a perfunctory needs assessment, this is an area where further technical assistance could be provided. Second, many legislative drafting programs are designed simply to draft the legislation. They do not include a component to help with implementing the law, which could and should include training for the judges and lawyers who will interpret and use the law, as well as for the citizens who will be affected by it.

Despite the foregoing concerns, there are examples where foreign expertise was sought and had an impact. The intellectual property part of the civil code was worked out with US assistance, largely by facilitating a meeting of the contesting factions and helping them to come up with a workable compromise. USAID, through PDP, CEELI, and IFES, played a similar role in facilitating the passage of the constitution, by acting as a disinterested broker and helping to get political opponents to sit around the table and find common ground. In another case some language was in a bill that would have violated international and European standards of free speech. An objecting MP enlisted the help of an NGO, which pointed out the potential violation if the law was passed. The provision was removed in the final version of the bill.

The constant factors in the “success” cases cited above seem to be three:

¹³ See M. Dietrich, “Legal and Judicial Reform in Central Europe and the Former Soviet Union: Voices from Five Countries” (The World Bank, Washington, D.C. 2000), p. 21.

- Outside experts must be knowledgeable about civil law, Ukraine, and the local political process.
- Outside experts and donors must work in a collaborative manner. Facilitating a process, playing the neutral broker, offering choices and information, as opposed to becoming a player with an outcome or product one is selling, may be a more successful strategy for legal reform. Certainly focusing on the political process is absolutely essential.
- Timing is everything: it helps to be asked for assistance, rather than “selling” the assistance.

In addition, sometimes USAID assistance in the process, as with the constitution, is more important than the assistance in the substance. More than 10 years after the break-up of the Soviet Union, moreover, there is sufficient local expertise on most substantive issues. Sometimes, however, local political concerns block discussions and compromises. USAID has successfully provided neutral settings for the political give and take needed to enact legislation. It is ironic that USAID can be sensitive to these political issues in some contexts, but in others treats legislative drafting as a non-political, quasi-scientific exercise. While the outcome of a facilitated process may not always be exactly what a donor hopes, by continuing to support dialogue and the provision of information, standards will be raised over time, amendments to imperfect laws passed, and so on. One knowledgeable American critic did sound a note of caution regarding USAID involvement in political processes, saying that when we do get involved, we sometimes reinforce the worst of Ukrainian tendencies toward backroom manipulation. Instead, we should be absolutely transparent. “How we do business is as important as the business we do,” he said, even though this leads to less certain results, and is more tedious and time consuming.

III. JUDICIAL REFORM

A. Current Status

1. The New Law on the Judiciary

The judiciary in Ukraine is in a state of flux: on February 7, 2002, the Rada passed a new judicial law that President Kuchma has signed and which will go into effect on June 1, 2002.

Since independence, the judiciary in Ukraine, as in Russia, has been bifurcated: the arbitration courts, a vestige of the Soviet system of arbitration between state owned enterprises, handled all disputes amongst commercial entities. The courts of general jurisdiction handled all other matters, including criminal cases, civil cases such as divorce and inheritance, and commercial disputes involving individual as opposed to corporate or state owned entities. The general court system was three-tiered, with a trial court, an intermediate appellate court, and then the Supreme Court (SC) at the apex. The arbitration courts were two-tiered, with the Higher Arbitration Court (HAC) at the apex of that system. The SC and the HAC were essentially self-managing, with a direct line item in the national budget, and the HAC also managed the arbitration courts beneath it. The MOJ funded and managed the lower courts of general jurisdiction.

The adoption of the constitution in 1996 brought significant changes to the judiciary. Perhaps most importantly, it mandated the creation of the CC, which was established in 1997. As in most civil law countries, the CC operates separately from the rest of the judiciary, is self-managing, and has its own line item in the national budget. Its role is limited to the important task of determining whether legislation complies with the constitution. As described below, the CC has taken some important decisions and is playing an active role in delineating Ukrainian democracy.

The 1996 constitution also mandated, by June 28, 2001, the adoption of a law reorganizing the judiciary. Several politically sensitive issues awaited resolution, including:

- Would the courts of general jurisdiction and the arbitration courts be merged?
- Who would manage the courts: the MOJ, or the courts themselves?
- How would judges and the chairmen of courts be appointed?

The MOJ, the presidency, the SC, the HAC, and various MPs all had different views as to how these quite fundamental questions should be answered. As a result, the Rada was unable to agree upon a full law. In order to avoid a constitutional crisis, one week before the June 2001 deadline it enacted amendments to the Soviet-era law on the judiciary and several other laws that have been characterized as the “small judicial reform.” The small judicial reform essentially merged the two court systems (creating seven intermediate courts of appeal for the arbitration courts), changed the name of the arbitration courts to commercial courts, and set up a system by which the president would appoint judges for five-year terms, after which their appointments would be confirmed by the Rada, essentially for life. Management of the courts of general jurisdiction remained with the MOJ.¹⁴

Before the small judicial reform could be fully implemented, however, and under the pressure of impending parliamentary elections, on February 7, 2002 the Rada passed an entirely new law on the judiciary. The new law confirms the merger of the arbitration courts into the rest of the system. While this was an effort to streamline the system, it may result in an unwieldy hybrid judiciary, with five levels of courts (local courts, courts of appeals, courts of cassation, higher specialized courts, and the Supreme Court). The new law also calls for the creation of a new judicial department that will manage the entire court system. It is charged with training judges, drafting budgets, collecting statistics, and providing support to the judiciary. Judicial appointments will be overseen by judicial qualification commissions that will recommend candidates for appointment to the bench by the president. Although the plurality of the membership of these commissions consists of judges, the president will be able to track appointments because of the participation of his appointees and a representative of the MOJ on the commissions. It is also unclear how much discretion the president has to reject the nomination of somebody approved by the qualification commission. Again, judges will be confirmed to essentially life tenure by the Rada after five years in office.

Although the new law has several positive characteristics, it is also problematic in that it seems to enhance the powers of the president. For example:

- Courts may be formed and dissolved by the president.
- The president appoints the chairman and deputy chairmen of the courts, for unlimited terms, on the recommendation of the Council of Judges. In contrast, the Chief Justice of the SC is elected by his colleagues in a secret ballot, and may be elected for only two five-year terms.
- “The Procurator General . . . and the Minister of Justice . . . shall [emphasis added] take part in the plenary meetings of higher specialized courts that consider the clarifications about the application of relevant law for the conducting the court proceedings.” This, and similar provisions regarding the SC’s meetings would seem to constitute executive interference with the judicial branch.
- The president sets the number of justices of the SC as recommended by the chief justice on the recommendation of the Council of Justice. This potentially gives the president the power to manipulate the court, reminiscent of the failed “court packing plan” of President Roosevelt during the New Deal.
- The Chairman of the new judicial department “shall be appointed to this post and dismissed from it by the President of Ukraine pursuant to the procedure . . . established by the prime minister . . . in coordination with the Council of Judges.”

¹⁴ A more full description of the organization of the Ukrainian judiciary under the small reform and before is provided in a February 18, 2002 memorandum by Vitalii Kravchenko, annexed as Exhibit D.

How the new law will work in practice remains to be seen. What is clear now, however, is that the Ukrainian judiciary continues to face some daunting challenges.

2. Current Caseload vs. Current Resources

The most evident current problem is one of funding and resource allocation. Over the past 10 years, Ukrainian society has placed increased demands on its judiciary, while its government has not commensurately increased the resources at its disposal.

According to one judge in Kyiv, the caseload in the local court has increased by three-fold over the course of the last three years. The number of administrative cases soared from 1,875 in 2000 to 5,663 in 2001. When asked to compare the caseload to earlier years she estimated that the court had about 350 criminal cases per year in 1997, compared to 898 in 2001. Before 1997, she estimated that about 1,000 civil cases were filed each year, compared to 4,000 cases in 2001. Overall, the caseload of this court, since 1997, has grown from an estimated 2,500 cases to a 2001 level of 10,566. The number of judges, however, has not increased significantly during this same period, remaining pretty steady at about 15 over the past eight years.¹⁵

The situation is similar in courts outside of Kyiv. The following statistics show the numbers of cases that have been filed and resolved with the general jurisdiction courts in Kharkiv:

Caseload Statistics from Kharkiv Oblast Courts of General Jurisdiction

	1991	1993	1995	1997	1999	2001
Filed	30,274	30,671	40,422	46,918	55,860	91,562
Resolved	23,724	24,108	23,223	36,091	45,735	77,775

Again, the courts there have not seen significant increased resources allocated to them to help meet this increased demand.

According to statistics provided by the SC, on a national level the caseload of the district courts have increased markedly between 1999 and 2000, particularly in the area of civil law:

National Caseload Statistics – District Courts Courts of General Jurisdiction

	1999	2000	# of new cases	% increase
Criminal	235,938	241,258	5,320	2.3
Civil	932,003	1,126,771	194,768	20.9
Administ.	393,984	413,471	19,487	4.9
Other	180,309	187,707	7,398	4.1
Total	1,742,234	1,969,207	226,973	13

The situation is no different in the commercial courts. The following statistics, provided by the Higher Commercial Court, show the growing caseload and the numbers of judges, on a national basis:

¹⁵ The local court that the team visited has 17 judges, and one vacancy. It used to have 15 judges, but the number was increased due to a restructuring of the Kyiv courts mandated by presidential decree that went into effect on Nov. 1, lowering the number of judicial districts in Kyiv from 14 to 10. Before Nov. 1, each district was responsible for about 200,000 citizens, and that has now increased.

**National Caseload Statistics
Arbitration Courts**

	Judges	Cases Resolved
1995	n/a	46,420
1996	n/a	60,995
1997	n/a	83,237
1998	n/a	125,192
1999	431	134,275
2000	487	156,684
2001	492	196,987

There is a multitude of reasons for the increasing caseload. Clearly, as the Ukrainian economy has grown and become increasingly privatized, the courts are more frequently being called upon to resolve business disputes. On a less positive note, Ukraine's changing society is also experiencing an increase in criminality. The number of murders in Kharkiv, a city of three million, for example, went from 62 in 1989 to 400 in 2001. Another reason for the increase is that courts are now resolving disputes that were previously heard by other state bodies. Labor disputes, for example, used to be heard by commissions within the state owned enterprises, whereas now courts hear these matters. One judge estimated that her court had heard 3,500 wage disputes last year. Also, traffic fines used to be paid directly to the traffic police (a source of everyday, street level corruption), whereas now the courts hear those cases – and reportedly are finding in favor of the citizen with increasing frequency. One judge in Kyiv heard 499 such “administrative” cases last year. In addition, adoption disputes, which used to be resolved by a state body, are now heard by the judiciary. In short, more and more citizens are turning to the courts for the protection and enforcement of their rights, which should be seen as a positive development for Ukraine. As one foreign lawyer said, “People don't want to settle for having their rights violated,” and there is a sense that the courts can play an important role in protecting those rights. The workload is also increasing for the judges in other ways as well: judges, rather than prosecutors, are now supervising investigations and issuing arrest and search warrants.

Unfortunately, the state has not allocated sufficient resources to the judiciary to enable it to do the work that it has been assigned. This is not to say that no efforts have been made. On August 20, 2001, according to the MOJ, the president issued a decree increasing the number of judges at the first level of the courts of general jurisdiction by 986, and the appellate courts by 580, but it is unclear the extent to which those positions have been filled. A judge in Ternopil reported that her court had 24 positions open, but no funding to hire new judges. As noted above, there have been small but steady increases in the numbers of arbitration court judges. Total funding for the judiciary has also increased, but only marginally, according to an analysis of publicly available documents:¹⁶

Funding of the Court System

	Military Courts	Arb. Courts	HAC	Gen. Jur. Cts.	Supreme Court	Const. Court	Total
1997	2,100	n/a	1,400	n/a	9,000	6,000	95,200
1998	1,900	7,019	1,766	72,881	9,000	20,429	112,995
1999	3,970	13,780	3,050	81,890	14,215	12,170	132,000
2000	5,372	26,399	6,616	124,728	13,123	16,512	195,221
2001	5,612	42,151	11,118	156,635	17,788	27,329	280,156

¹⁶ The figures, some of which have been rounded off, are in thousands of Ukrainian hryvna. The sums are not corrected to take inflation into account. The full analysis, prepared by Vitalii Kravchenko, is annexed as Exhibit E.

More funds are allocated for 2002:

	Mil. Courts	Local Comm. Courts	App. Comm. Courts	Higher Comm. Court	Local Courts	App. Courts	SC	CC	Total
2002	6,215	54,539	40,184	10,109	147,093	37,408	23,528	17,667	429,744

Note that the 2002 budget includes a special increase of 90,229,600 hryvna for implementation of the judicial reform package.

Although the increased amount is encouraging, the percentage of the national budget allocated to the judiciary has remained relatively low:

Percentage of the National Budget Allocated to the Court System

	1998	1999	2000	2001	2002
% of budget	.46	.52	.56	.64	.86

Without the special allocation of 90,229,600 hryvna for implementation of the judicial reforms, the percentage of the national budget allocated to the judiciary for 2002 becomes .68. The percentages of the national budget allocated to the judiciary over the years have remained relatively flat, demonstrating a weak governmental commitment to the development and support of the Ukrainian judiciary.¹⁷

3. Consequences of Under-funding

The central government’s failure to adequately support the judiciary in Ukraine has had several deleterious consequences.

First, it means that the judiciary, as has happened in Russia, turns to local authorities for support. One general jurisdiction judge reported that although the MOJ is supposed to provide all administrative support, it sometimes just pays salaries, but does not pay for electricity, paper, pens, computers, etc.¹⁸ Under the current system, because courts are not “legal entities” and cannot open bank accounts, all filing fees received by the court are given to the local administration. Although the local administration has no legal obligation to support the courts out in return, the courts can and do request assistance. As one judge reported, this “diminishes the stature of the courts.” Another judge admitted, “We also go to local authorities for help: it is necessary to survive, but it effects the quality of justice.” Under new law, it should be noted, courts will have the status of legal entities, and funds will be allocated to them directly from the state budget.

The reliance on local authorities indeed impinges on the independence of the judges, who must often rule in cases that either directly or indirectly affect the local authorities. Several stories were told of local court collusion with local authorities. Two lawyers we met with are representing the Russian investors in a company in Ukraine, of which they held 49 % of the stock. The Ukrainian management unlawfully changed the by-laws, without involving these main stockholders. The local administration unlawfully registered the new charter, violating six or seven provisions of the law such as regarding the

¹⁷ Financial pressure has been used a tool against the judiciary already. The Rada cut the CC’s budget in 1999 after it had declared unconstitutional a law that would have enabled the Rada to fire without cause officers who audited it.

¹⁸ A judge in Kharkiv reported that the government does not always pay the full amount of salaries owed, saying that sometimes she will receive about \$ 110 of her \$ 160 monthly salary.

certification of board minutes. Under the new charter, additional stock was issued, and the 49 % ownership was reduced to 20.7 %. The main assets of the company were then sold to a third party, and the Russian clients lost an estimated \$ 15 million. Had it not been for that wrongful certification of the new by-laws, these damages would not have been possible. The Ukrainian courts are finding that there were violations, but that the local administration cannot be held accountable, and the local court has reportedly used additional procedural ploys to protect the local administration. Interestingly, the European Court of Human Rights in Strasbourg court has accepted jurisdiction in this case to determine whether there was a violation of Art. 6 of the Convention, which guarantees the right to fair procedures

Sometimes the judge will call the administration for guidance, even while the lawyers are present. One environmental lawyer described a case involving small company that was dumping toxins into a lake, killing the fish. A local yacht club wanted to rent the lake from the state, and turn it into an environmentally clean area. The local government administered the lake, and there was a lease agreement between it and the company. The local court would not order the contract broken, even though the filings had not been done properly and the company was in breach by polluting the lake, because the proprietor of the company and the head of the local administration are relatives. While the environmental lawyer was in the judge's office, the judge called the vice-chair of the local administration and asked, regarding the lease agreement, "You have this contract properly registered, don't you? Everything is in order, isn't it?"

The under-funding of the judiciary undermines public confidence in the courts in other ways as well. Although the higher courts have new or recently renovated buildings, most of the lower courts are in poor condition, and do not provide an appropriate environment for the dispensation of justice. Moreover, several courts have actually sued the MOJ for the support that they were owed. This type of infighting cannot build public confidence in the judiciary. Additionally, the increased caseload will cause delay or hasty decision-making, both of which will undercut public confidence in the courts. Delays in particular will contribute to corruption, as litigants pay bribes to have decisions rendered on a timely basis (not to mention in the "right" way). One commercial court judge reported that the law requires them to hear cases within two months, subject to a one-month extension. Up to 2000, his court could meet this requirement, but now he is not so sure: "We can do only so much on heroism and patriotism. We need to ask whether we are given sufficient funding to make judicial reform complete." A business NGO leader said that her members had taken many tax cases to court, with favorable results, but now "we are trying to avoid going to court because of delays, so we are more and more negotiating with the tax authorities. Also, this means we do not need to pay legal and filing fees." While it is certainly not bad for potential litigants to resolve their cases outside of court, these comments also indicate a loss of confidence in the system.

A third consequence of the insufficient funding is the lack of training and information that is provided to the judges. The MOJ was roundly criticized by lawyers and judges for its failure to provide sufficient copies of laws to the courts of general jurisdiction. Several lawyers opined that the inconsistency of decisions in the lower courts had more to do with the lack of training and information than with corruption and venality. A judge in Kharkiv reported that his court, with 10 judges, receives only one copy of new legislation. Most judges, of course, do not have the computers (or the computer skills) to access the legislative databases that are available. In terms of training, one judge, who had been on the bench for nine years, reported that he had never once been to a training provided by the MOJ, although he had attended some conferences organized by the SC. He added, however, that the judges at his court sometimes do some ad hoc training amongst themselves. The Higher Commercial Court reported that it trains about 100 judges each year. The JTC at the SC reported a much higher level of activity than the team had been led to expect. Between 1997 and 2001, it organized 26 ten day sessions, training 313 oblast court judges; 83 shorter sessions, at which there were 8,495 attendees; and 75

conferences with 3,636 attendees. It distributed 7,000 booklets and 4,000 copies of law books during these conferences. All of this work was done, however, with the support of the donor community.

A fourth consequence is that the courts have few computers or other equipment to enable them to function efficiently. This problem is especially acute because the 1996 constitution requires the verbatim transcription of some types of cases, but few courtrooms are equipped with the necessary equipment, leading to delays in trials. There is apparently only one courthouse in Kharkiv with the requisite equipment, and the courtroom is booked for three months. This situation puts the judges in something of a Catch-22 because the case can be dismissed on appeal if it is not recorded properly, but the judge can be subject to disciplinary proceedings if he fails to conduct the trial in a timely fashion. This is exactly what has happened to the judge overseeing the trial of the defendants charged with the murder of the journalist Alexandrov in Donetsk. Some observers feel that the prosecution of this judge, who is subject to dismissal, is politically motivated.

A fifth and obvious consequence of the under-funding is that judges are not well-paid, making it difficult to recruit suitable candidates to the profession, and making it more likely that they will succumb to the temptations of corruption. A young judge is reportedly paid about \$ 80 per month, and more senior judges, at the local courts, receive \$ 100 – 150 per month.

A final result of the lack of resources is that judges and courtrooms are not well protected, and the team indeed heard stories of judges being assaulted. It was reported that only two of the 44 courthouses in Kharkiv Oblast have police protection. The judicial police, it should be noted, are funded and administered through the Ministry of the Interior.

One assistance provider summed up the situation in the courts by saying that the judges do not have the information, the training, or the time to do a good job. A Ukrainian lawyer said, “Now we have destroyed the old system, but we have not yet created anything new. We are trying to make things better, as in the United States or Europe, but economically we cannot afford full-scale judicial reform.” Another judge noted that society simply has not recognized the new burdens that it has placed on the judiciary, and that the judiciary needs to do a better job – working with the mass media – of educating the public concerning its new role if it is to expect improved funding and conditions.

It should be noted that the higher courts and the commercial courts in general – in other words, those courts that have their own budgets and are self-managing – are in better shape than the courts of general jurisdiction. The key questions for the future are whether the new judicial department will do a better job of obtaining resources for the courts than did the MOJ, and whether those courts that are losing some of their financial autonomy under the new law will suffer.

4. A More Independent Judiciary?

The new law on the judiciary includes some important guarantees of judicial independence, including stating clearly that judges have immunity for their official actions, and guaranteeing their tenure up until retirement age. The court system, however, already has taken some important steps to enhance its independence and build its credibility.

The courts, for example, are beginning to change the way cases are accepted. One of the local courts in Kyiv has taken the job of reviewing cases to be filed from the judges and assigned it to a court “consultant” or clerk, who checks to make sure that the papers are in basic order, and that the court has jurisdiction over the matter. He does not otherwise provide any advice to the litigant. The consultant was given this job to prevent judges from having *ex parte* communications with litigants. Somewhat oddly, the court accepts cases for filing only on Tuesdays, Wednesdays, and Fridays. Previously, however, cases

were received only two days a week, for three hours a day, and all the judges were involved. The position of consultant existed before judicial reform, but he did analytical work for the MOJ. The Vice Chair of the court in Kyiv reported that the new process was “very effective” because judges now have nine hours per week more to work on cases. It also means that judges have fewer opportunities to engage in ex parte communications with lawyers and litigants, thereby limiting the opportunities for corruption and enhancing the perceived independence of the judges.¹⁹

Another change that improves the transparency of judicial proceedings has occurred in the commercial courts. Prior to the “small judicial reform,” only one judge would hear commercial cases, and there would be no one present – most decisions were made based solely on documents submitted. Now three judges hear each case, there is a public hearing, and the result is reported to be a higher level of scrutiny in the decision-making process.

The balance of power amongst the judges, prosecutors, and lawyers has also changed as a result of the “small judicial reform.” Now, only judges can issue arrest warrants. Previously, the prosecutor did that, and it was easier for the investigator to persuade the prosecutor than it is to persuade the judge. Also, now the prosecutor must submit the indictment, whereas previously the judge would read it. Defense attorneys reported that in general the playing field is more level. Previously, the prosecutor was 99.9 % sure that he would win, but now, lawyers say, judges are feeling freer to come up with not guilty verdicts, and are also now ordering the release of illegally detained defendants.

Prosecutors also have less ability to intercede in civil or commercial cases. Pursuant to the reforms and to a CC decision, the procuracy may become involved only if there is a legitimate state interest at stake. And the procuracy has also lost its general supervisory powers. These changes mark a tremendous break with Soviet traditions.

The courts, particularly at the higher levels, are taking decisions that run counter to the interests of the state. The CC, for example, has invalidated the propiska (internal registration) requirement, enabling people to move freely about the country and live where they choose. This ruling reportedly upset the presidential administration because it could effect how elections are run. In another case, the CC ruled that the president did not have the power to appoint deputy heads of local administrations. In another matter, the plaintiff had been committed, by the state and against his will, to a psychiatric clinic, but had been unable to obtain the records needed to contest his confinement. The court ruled that the constitution guarantees the right to obtain information about oneself, and ordered the records released. In a more controversial matter, the court struck down two out of six proposed amendments to the constitution, mostly designed to enhance presidential powers, in the 2000 referendum. While some feel that the court should have vitiated the entire process, the CC must be mindful of the fate of its sister institutions in Central Asia, which have been largely disbanded or stripped of meaningful power. Accordingly, the CC is proceeding in what some would call a “pragmatic” manner.

The SC has also been active, particularly in electoral cases where it has overruled decisions by the Central Election Commission, including – in a matter strongly criticized by President Kuchma – ordering the registration of seven candidates for president. More recently, the court found that an order to re-arrest Yulia Tymoshenko, a political opponent of the president and a minister in the Yushchenko government who had been charged with corruption, was illegal.

In April 2001, the SC plenum issued a guiding opinion on the question of moral damages, instructing courts to apply the European Convention to limit claims for huge amounts of damages against

¹⁹ Another simple step that could be taken to increase public confidence would be to have cases assigned randomly rather than by court presidents, as is currently done.

journalists. It is noteworthy that a USAID grantee, IREX/Pro Media, worked with the SC for two years to help convince them to adopt these new standards and issue their guiding opinion. The end result of this work and of the SC decision is that it is more difficult to plaintiffs to use the courts to close down troublesome newspapers. It was also a SC guiding opinion that instructed the lower courts to apply directly the procedural protections contained in the 1996 constitution – a directive that the courts are taking seriously.

The available polling data also reflects a growing increase in trust in the higher courts. In one survey, Ukrainians were asked to report on how much confidence they had in various institutions of the legal system.²⁰ The CC was given a rating of fair to great amount of confidence by 27 % of respondents in 1997, increasing to 39.5 % in 2000, and improving to 45% by 2001. This positive response was not matched, however, when respondents were asked about courts in general in Ukraine. In 1994, 32% of the respondents gave the courts a fair amount to great deal of confidence rating, but by 2000, this had slipped to 29.6%. In 2001, in a new survey, questions were asked specifically about trust in the SC as distinct from the local courts. The SC received a somewhat or fully trusted rating from 44% of the respondents, nearly the same as the CC, while local courts received only 26.9 %.²¹

Despite the growing public trust in the higher courts, there are still serious limits to judicial independence. Most observers believe that if a case involves important political or financial interests, the courts will feel obligated to find in favor of the state or the oligarchs. Challenging the executive power clearly has risks. In May 2001, for example, the police broke into and searched the chambers of Judge Mykola Zamkovenko, a Kyiv judge who has issued decisions adverse to the executive in the Gongadze and Tymoshenko cases. President Kuchma subsequently dismissed Judge Zamkovenko from the judiciary. In another high profile case, the judge has reportedly told one party that he cannot make a decision, due to political pressures. This informant felt that not taking an action was the best that this judge could do: a bad judge just would just have taken a decision that conflicted with the law, something that is reported to happen on a regular basis in high level cases. Several lawyers reported that the courts use procedural delays as a means of avoiding taking decisions entirely. One lawyer said, “If a judge can find a procedural problem, he can avoid making a decision, which is culturally easy. There is a generation of people afraid to make a decision, and waiting for word to come from the top.” Most lawyers felt that in low level cases, mistakes might be made, but that a litigant can expect to be treated fairly, and that the quality of the decision-making improves as you go up the chain of appeals. But if the political pressure is there, it simply means that the higher level courts will be more careful in the way they phrase their opinions, and that it is unlikely that justice will be served.

It should finally be noted that although the law provides means for registering complaints concerning ethical violations by judges, most observers felt that those mechanisms are used selectively and in order to intimidate judges working on politically sensitive cases. The Supreme Council of Justice, which recommends appointments to the judiciary and hears appeals from lower committees concerning ethical violations, did not provide any statistical data, but the recent U.S Department of State Report on Human Rights found that 41 judges – a high number – had been dismissed during 2001.²² Judicial corruption, in other words, continues to be a significant concern. The mix for addressing it has already been mentioned: harmonizing and clarifying the legislative framework, increasing judicial salaries to attract more ethical candidates to the judiciary, and increased training on ethics. In addition, the transparent and fair prosecution of those suspected of corruption is also required.

²⁰ RS Center, Ukraine Data from 1994 – 2000 (January 18, 2002).

²¹ Of interest is the rating given to the two enforcement arms of the state, the police and the prosecutors. Only 25 % of the Ukrainians said they somewhat or fully trust the police, with 32.4 % saying the same about the office of the Public Prosecutor.

²² P. 8.

5. Enforcement of Judgments

All informants complained that the enforcement of judgments in Ukraine is a serious problem. A new law on enforcement was passed in 1999, establishing a department attached to the MOJ, but, according to one observer, the process is “ripe with abuse.” Another lawyer reported that there are “myriads” of ways to move assets, and by the time you get an order freezing them, “it’s too late.” The law provides that if the director of the company does not cooperate with the enforcement body, he can be fined, but only small amounts: \$ 50 the first time around, \$ 100 the second time, and then the only recourse is to the procuracy. EcoPravo L’viv reported that it had won a case in 1997, but the decision still had not been implemented “and probably never will be.”

USAID’s Commercial Law Program, being implemented by Deloitte & Touche, is working on this issue. It will be important for USAID and its Ukrainian counterparts to identify whether the problems with enforcement lie with its design or implementation. The only thing that was made abundantly clear to this team is that the current system is not working.

B. Donor Interventions and Impact

The foregoing portrait of Ukraine’s judiciary shows an institution that is struggling, under the weight of increased societal demands and political pressure, to become an independent third branch of government. The judiciary has taken some important steps forward, but still faces immense challenges. Ten years after independence it remains unclear whether the court system will emerge as a cornerstone of true democracy in Ukraine. What has the donor community, and USAID in particular, contributed to this process?

1. USAID Programs

USAID’s primary intervention in the judicial arena was the program implemented by ARD/C, under the rubric the Rule of Law Consortium, between 1993 and 1999. During this period, ARD/C purchased computers for the courts, brought numerous judges to the U.S. for training programs, helped to build libraries in the Higher Arbitration and Supreme Courts, and also helped those courts to conduct training programs and develop judicial training centers.

The team met with numerous judges who had been to the United States through the ARD/C program, and it was clear that the opportunity to see how their colleagues in America worked had made a lasting impression on them. The chairman of the appellate commercial court in Kharkiv, for example, visited the National Center for State Courts in Williamsburg, Va. in 1994, and saw there a fully computerized courtroom. He recognized the importance of technology, and on his return emphasized the need for computers and automation. He now oversees the only courthouse in the oblast that is fully computerized (with 78 stations), with a network, and access to email, and access to a legislative database. The filing system is also computerized. He also created a pilot courtroom that is fully equipped with computers and audiotaping and videotaping equipment. He “knows what needs to be done, and he knows how to do it,” he just does not want any constraints. Clearly, the trip to the United States had energized him, and he had made the most of his opportunity when he returned.²³

²³ The arbitration courts generally seemed to have benefited more from the ARD/C program, with 39 judges have been on study tours to the United States, and over 300 judges and staff members having attended ARD/C training events in Ukraine. The Higher Commercial Court expressed great interest in renewing cooperation with USAID. The entire CC also visited the United States on an ARD/C program.

Similarly, a judge in Kyiv had found her trips to Ohio (funded by ARD/C) and Canada (funded by CIDA) extremely useful, especially to observe the courts' equipment and the status of judges. The equipping of three model courts by CIDA came about as a result of her visit to Canada, even though the project was never completed. The idea of using "consultants" to handle case filing also resulted from the trip to Canada. She was also impressed by the judicial code of conduct in Canada, and accordingly the Congress of Judges adopted a similar code last year. More than one judge re-iterated that it is better to see something once than to be told about it one hundred times.

One feels that terms like "separation of powers" and "judicial independence" did not necessarily mean very much to these judges until they had a chance to see their real application in the west. One CC judge, in a June 2001 interview with one of the team members, explained how the court is seeking to act as a counterbalance to the other branches of power, and cited both Marbury v. Madison (holding that it is up to the courts, not the executive, to determine what the law provides) and the writings of Alexander Hamilton. A Supreme Court judge noted that the Ukrainian courts should be managed by a separate administrative body, as in the United States, and not by the MOJ. He added that judges need to understand that the citizen and the state are at the same level, and not subordinate one to the other; decisions from the Strasbourg court should be used to help spread this message. The importance of introducing these concepts to judges in a meaningful way should not be understated. As one long-time observer reported, "The judiciary has seen what judges are like in other countries, and they do not want to revert to being the low-level bureaucrats they were in Soviet times."

ARD/C also supported a number of in-country training programs for judges, as the following chart indicates:

ARD/C Supported Judicial Training Programs

	1995 programs/ judges	1996 programs/ judges	1997 programs/ judges	1998 programs/ judges	1999 programs/ judges	Total programs/ judges
Arb. Cts.	7/190	4/200	2/50	4/250	0	17/690
Gen. Jur.	3/75	3/240	1/25	5/240	19/200(?)	31/780
Total	10/265	7/440	3/75	9/490	19/200(?)	48/1470

At the outset of the ARD/C program, its training emphasis was on having American experts teach Ukrainian judges new topics relating to economic development (such as bankruptcy, international transactions, and intellectual property) and the development of the legal system (such as judicial ethics, judicial independence, and court management). "After about a year," according to ARD/C, "we realized that the American portion of the educational programs was not particularly effective. Teaching American law to Ukrainian judges had little practical effect in a Continental System . . . We therefore switched emphasis from organizing specific judicial education programs to building the capacity of the courts to provide judicial education for their judges."²⁴ ARD/C therefore went about helping both the HAC and the SC to develop judicial training centers (JTCs). ARD/C's efforts in the area of judicial training, accordingly, can be analyzed on two levels: 1) What was the impact of the individual training programs? 2) What was the impact of the efforts to create the JTCs?

In terms of training, judges who participated in ARD/C programs were uniformly grateful for the opportunity, and had found the training useful. But participants had difficulty articulating how they had put the specific information provided to use, which is not surprising since most of the programs occurred several years ago. It is noteworthy that the programs seem to have reached all of the judges in the arbitration court system. Most programs sought to instruct 25 judges, which also seems to be about the

²⁴ Final Report on the ARD/Checchi Consortium Rule of Law Program in Ukraine (September 30, 1999), p. 5.

right size, although some programs were much larger. A couple of concerns arise, however, from a review of the list of the programs that ARD/C offered. First, the menu of topics seems somewhat scattershot, including such matters as land law, tax law, admiralty, computerization, etc. Of the 48 programs that were offered, only three concerned the civil code, which ARD/C was also helping to draft. A closer linkage between these two activities may have been useful. On a broader note, and as discussed above, legislative drafting programs should include training components for judges and lawyers so that the law can be more readily enforced after it is enacted. In addition, a greater effort should have been placed on developing a reproducible series of programs, perhaps designed for newly appointed judges, rather than on what looks, in hindsight, like a fairly ad hoc collection of disjointed programs.

ARD/C devoted considerable resources towards establishing the JTCs at the SC and the HAC, including providing equipment, bringing judges to the United States, and conducting three in-country programs on adult education techniques and the like. Both the JTCs of the SC and the HAC continue to exist and to operate, although on a limited scale. According to these courts, the Higher Commercial Court conducts only two trainings each year; the SC conducts programs, but only with donor assistance, on an ad hoc basis.²⁵ The reason given for the relatively low level of activity is lack of funding, although it also seemed clear that American organizational and motivational skills were a catalyst for the programs when they were more active, during the ARD/C era. Although the long-term results of the ARD/C work in this area are disappointing (a better legacy would have been a systematized approach to training all new and sitting judges), the training centers are far from dead letters, and what is there is unlikely to have been created without the support of ARD/C.²⁶ One other concern reported by some observers is that ARD/C, perhaps because it was funded at a time when more U.S. money was going into Ukraine than the institutions could readily absorb, sought to create two competing training centers, one at the SC and one at the HAC. In addition, ARD/C's strong support of the HAC (which reportedly was one of the few organizations ready, willing and able to work with ARD/C in the mid-1990s) may have had the unintended consequence of emboldening the HAC in its battle to survive as an independent entity, thereby contributing to the political conflict between the HAC and the SC that was not resolved until the passage of the "small judicial reform" in June 2001.

Computers and equipment delivered through the ARD/C program to 27 oblast courts and the arbitration court are also still being used, but while donations of equipment are especially appreciated, the judiciary has not generally taken the initiative to maintain, supplement, or replace the equipment. The designated courts used to receive monthly updates of Rada laws on a CD-ROM but this is not now happening. Judges can still get access to the law, but it requires some effort. CIDA's experience with helping to computerize a courthouse in Kyiv is also instructive in this regard. In 1997, according to an agreement between CIDA, the SC, and the MOJ, CIDA was to provide the equipment and the software, and the MOJ and the SC to provide the server, the network, and the database. CIDA did what it said it would do. The SC provided a database and updated it for one year, but then stopped because it felt that the MOJ should supply all material needs (the court can still use the computers for filing purposes and to get other decisions that the court has made, but not for legal research). The MOJ indeed provided a server, but it could not support the network. The judge the team met with was frustrated by this experience, and wished that CIDA had gone straight to the court, and by-passed the SC and the MOJ. Most of the other equipment provided to the courts, whether by USAID or other donor organizations, are likewise stand alone operations, that have not been fully integrated into a judiciary-wide network. In

²⁵ In addition, courts throughout the country provide periodic, ad hoc training for their judges; and donor organizations provide trainings for judges on topics of specific interest to them (e.g., CEELI, the COE, and the IRF on human rights, Winrock on trafficking, etc.).

²⁶ TACIS seems to be stepping into the void left by ARD/C. Starting in August 2000, it has helped to provide office furniture and computers for the SC's JTC, and has helped it to establish regional centers in Crimea, L'viv, Odessa, and Kharkiv.

terms of automation, better coordination amongst the donors and the host country would obviously have led to better results. Generally, the higher one goes up the court ladder, the greater the access to good equipment. The commercial courts are better equipped and tend to have better access to the law than the courts of general jurisdiction.

One other point regarding both training and providing of equipment. The training and equipping of courts are fundamentally government obligations. Programs that take on such governmental duties should include a clear strategy for handing those obligations over to the government, including an agreement for funding such operations well into the future. Of course, there are no guarantees. CIDA tried to do that with the equipment program described above, and the government failed to meet its obligations. In any event, these types of programs should build support for demand, but not dependency on the international donor community, which will not ultimately be sustainable. Considerable thirst for training exists; the team heard reports that many judges in the regions were holding their own training sessions for their colleagues. This should represent an opportunity.

Another successful intervention by ARD/C was the creation of the law libraries in the courts, which, when visited by one team member in June 2001, were being used and were greatly appreciated.

Other than ARD/C, the only other USAID program to have significant contact with the judiciary is CEELI, mostly focusing on the creation of local associations of judges, originally in Crimea, Kharkiv, and Ternopil. In other countries in which it has worked, CEELI has helped to create national associations of judges that become either training vehicles (as non-governmental predecessors to judicial training centers) or lobbying organizations, or both. For political reasons (the opposition of the Council of Judges), CEELI was unable to foster the creation of a national association in Ukraine, and so turned to supporting these local groups. These associations have conducted some training programs for their members, published newsletters, and have helped to articulate issues of concern to judges (such as the underfunding of the judiciary). Last year, for example, CEELI and the local judges associations held eight conferences around the country, each attended by 25 – 30 judges. But the growth of local associations was stymied by the continued opposition of the national council of judges. Then, in May 2001, CEELI organized a conference on judicial self-governance and judicial associations, co-sponsored by the Council of Judges, the SC, and two of the regional associations (Kharkiv and Ternopil). This was the first time that judges from throughout the country had gathered together in one room to discuss the problems of the judiciary. During the course of the meeting there were many questions as to whether local judicial associations were permitted under Ukrainian law, and at the close of the meeting the chairman of the Council of Judges announced that the time for prohibitions was over. Subsequently three more associations were organized (the Swiss assistance providers working on judicial training and education informed the team that a local association exists in each oblast).

Despite this success, interviews with judges gave rise to some concerns regarding the associations. The judges, for example, know that they have problems, but do not necessarily see the associations as a way to solve those problems. The leader of the association in Kharkiv could give no clear explanation of why the association was started: “We didn’t know what an association of judges was, although we had heard about them in Europe and the United States.” Its current top priority is “taking care of judges,” which it does by providing a connection to the internet, access to the legislative database, a newsletter, and periodic training programs. Indeed, the association seems to be valued, because almost all judges in the oblast are reported to be dues-paying members.²⁷ On the other hand, most of the funding for the Kharkiv association seems to have gone to reconstructing its office space, which cost more than expected and for which it still owes money to the contractor. The association, in short, appears to be out of money, and it is not sure what it can do to raise more. CEELI’s Regional Institution Building Advisor

²⁷ It costs 10 HRV (\$ 2) to join, and then 50 HRV (\$ 10) each year, although retired judges can pay less.

expressed frustration with the judges associations generally and is concerned regarding their sustainability. Part of the problem may be that it is the status of being a judge rather than being part of a larger movement or cause that is the common link amongst its membership, as well as the fact that the idea for the creation of an association came largely from the outside.

Moreover, the overall contribution of the local judicial associations to the cause of judicial reform in Ukraine remains unclear. Although the leadership of the associations voiced their concerns regarding the new law on the judiciary to the Rada, for example, we do not know what impact those discussions had on the law that was passed. On the other hand, USAID has not invested a lot of time and money into the associations, and as the process of judicial reform unfolds as the new law on the judiciary is implemented, a more activist role for these associations may emerge.

2. Awaiting the Law on the Judiciary

The ARD/C contract ended in 1999 and was not renewed. Most judges that the team interviewed did not know why this was the case. In their view, by providing equipment, conducting training materials, building libraries, and funding visits overseas, the ARD/C programs had been providing a good and useful service to the judiciary, and doing things for it that the Ukrainian government either could not or would not do.

USAID had a different view. Through ARD/C, it had expended over \$ 14 million on legal reform in Ukraine, and after five-years of work was not seeing long-term, structural results within the judiciary. Observers still felt that the courts were corrupt and subject to political manipulation, and no law on judicial reform had been passed. As a draft U.S. government strategy paper from December 1998 put it, “The donor community as a group has concluded that after seven years of providing assistance to Ukraine, its collective approaches have not succeeded in fundamentally changing the policy environment.” USAID, because of the apparent lack of “political will,” as well as USAID funding cuts, determined not to renew a full rule of law program, pending the passage of a law on the judiciary.

Unfortunately, based on the team’s discussions with leading members of the judiciary, no one seems to have made clear to the judiciary that the passage of a law was a prerequisite to additional USAID assistance. The opportunity to use support for the judiciary as leverage to influence the passage of a law, to the extent forces outside the tricky confines of Ukrainian politics could have had an influence at all, was insufficiently exercised. Although the draft U.S. Assistance Strategy from December 1998 urged that the U.S. government “should make clear to Ukraine that funding for top-down programs will continue only in response to tangible signs of reform,” it appears that this message was conveyed only to a few policy-level elites. A more broad approach may have engendered greater, grassroots, support for change.

In addition, although USAID worked for the adoption of a progressive law, emphasizing the passage of the law itself as a condition to greater assistance may not have been the best choice, and many knowledgeable Ukrainians and foreigners were critical of it. Much work to enhance the independence and efficiency of the judiciary could have been done absent the passage of such a law, and the mere passage of a law does not guarantee “independence.” Looking for the structural and financial indicia of judicial independence would have been a better “indicator” than the simple enactment of a law on the judiciary, which could – and does – include some very troublesome provisions.

Finally, the presence or lack of political will – however defined – should not be dispositive of whether there should be a judicial program. If USAID has decided that, overall, it wants to foster the creation of an efficient, accountable, and independent judiciary, political will should be one factor to be considered in delineating the size, scope, and expectations of the program. Moreover, the donor

community should be wary of treating a complex country like Ukraine as a monolith. The government certainly includes reformist elements, and programs can be used to help further their reformist agendas. In a country like Ukraine, a large and economically viable country, appropriate domestic funding decisions will ultimately flow from political will. In a sense, therefore (*pace* Tom Carothers), the lack of political will militates for the presence of a judicial reform program. Should that program, without broad and clear political will, be purchasing computers for all the judges in the country, or taking unreformed leaders to the United States? No. But a modest program that helps to form demand amongst the judiciary and indeed provides some services that the government should but is not providing, is not inappropriate. Having such a presence on the ground, moreover, would mean that experts would be in a better position to help define the scope of judicial reform legislation. Although the U.S. government sought to do this through the periodic visits of ad hoc rule of law experts, as well as through the work of PDP, this was not the level of engagement that a modest program focused on judicial reform would have brought to the table.

Frustrated by the lack of apparent results from its work with the judiciary, and in the face of an increasingly strong presidential authority, USAID and others in the donor community, beginning in 1999, refocused their efforts and began to emphasize more grassroots and bottom-up approaches to legal reform, including enhancing access to justice.

IV. ACCESS TO JUSTICE

A. Developments since Independence

Access to justice is another broad term that can encompass a number of issues, including the availability, affordability, and quality of legal representation; access to legal representation through legal service organizations or law school clinics; public awareness of the law; and more mundane matters such as filing fees and the locations of courts. It may also cover whether the law as written is applied to protect certain individual rights or attain certain societal goals.

During the Soviet era, the issue of access to justice was largely irrelevant because the courts were not charged with resolving as many societal disputes as they are now, and lawyers had fewer powers than they have now. If a citizen had a complaint, it would more likely be addressed (if at all) at his or her workplace, or by the CP, or by the procuracy. More often than not, however, those accused of interfering with state or party interests would enjoy not true access to justice. Individuals could be arrested and detained without having access to a lawyer. Independent trade union activists could be dismissed from jobs or otherwise harassed by employers, without recourse to legal protection. In today's Ukraine, access to justice continues to be an important concern for women subject to the trafficking trade, journalists who are the objects of state intimidation, and business people exposed to harassment by local officials.

In some ways, the Ukrainian public seems to be well aware of the importance of the law and their right to access to justice. As already noted, citizens are more frequently taking recourse to the courts, resulting in increased caseloads. Although some of the reasons for the increased caseload are because of changes in the law giving greater jurisdiction to the courts, a number of interviewees noted that people are more interested in protecting their rights. The survey data, however, show that only 3 % of Ukrainian citizens required help from a judge or a lawyer each year between 1994 and 1997. In 1998, the percent rose to 5 percent and has remained constant through 2000.²⁸ While this is a small increase, it does

²⁸ Survey from the International Foundation for Election Systems (IFES).

represent a near doubling of the use of the system, a figure that is matched or surpassed by other data, already discussed.²⁹

Regarding the bar, all graduates of law faculties in Ukraine are referred to as jurists. Jurisconsults are generally business lawyers who usually work in-house advising companies, but who may also appear in court on behalf of their business clients. Notaries prepare and file important documents such as wills and contracts. Advocates are licensed by local collegia of advocates to represent defendants in criminal matters. It is this last segment of the legal profession that has endured the largest change.

Before 1992, when a new law on the advocatura was passed, each collegium of advocates in each oblast controlled admissions to the advocatura. Under the new law, it was required that an advocate have a legal education, and then pass an examination administered by both the collegium and the MOJ. The MOJ then issued a license. Subsequently, the MOJ – driven by financial needs – started issuing licenses, without the examination, for 500 HRV (about \$ 100) each. Recently, on October 16, 2000, the CC took a further step and ruled that any jurist – law school graduate – may appear in court as a defense lawyer. Although the reasons for the CC decision are unclear – some advocates believe that the court was lobbied by the jurisconsults – the repercussions are troublesome. Now, without undergoing any licensing or qualification procedure, any law school graduate may act as a criminal defense lawyer. When combined with the poor quality control over law schools and law school graduates (described below), this situation could lead to a very uneven quality of representation for criminal defendants in Ukraine.

The situation is particularly troubling because the advocates have taken steps to improve their profession, in particular by adopting a code of ethics in October 1999. Non-members of the advocatura who commit disciplinary offenses will not be subject to the same punishments, including reprimand, suspension, or disbarment, that the members of the advocatura are subject to. Moreover, some judges report that at the lower and appellate court level, counsel is often poorly prepared or does not know the law. One appellate court judge told us, “I frequently have to help counsel along.”

As already noted, however, advocates do feel that they can better represent their clients since the small judicial reforms. One of the most positive changes is that the advocate can get involved very early, when the prisoner is in detention; previously, the attorney could only get involved at the indictment. And the lawyers are reporting better results for their clients. One defendant was indicted for an aggravated murder and rape in 1994. The investigation proceeded without an attorney, and the defendant was beaten up and forced to confess. In 1997, the defendant was convicted, but on appeal the sentence was thrown out, and the SC then confirmed the acquittal. This was the first time in Ukraine that a defendant charged with such a crime was acquitted. The defendant then filed a claim against the oblast for damages for wrongful imprisonment. The lower court entered a judgment for 18,000 HRV (about \$ 3,500), which the SC increased to 47,000 HRV (almost \$ 10,000).

As discussed below, lawyers are also obtaining better results for their clients in cases involving wrongful dismissal, for wages and pensions, as well as in the areas of environmental law, media law, and the protection of human rights generally.

²⁹ Other polling data also reveal substantial public commitment to rule of law values. When asked whether restrictions on rights of citizens, press or authority of courts can sometimes be justified to “ensure order,” the response in favor of “never be justified” was 52 %. In another question, 95 % of respondents said “taking bribes” can never be justified. When asked about the importance of the 2001 draft law on Judicial Reform then pending in the Rada, 36.6 % of the respondents said the law was important, while only 2 % rated it not important.

B. Donor Interventions and Impact

1. Use of the Courts

One of the hallmarks of a society in transition is the growth of classes of people who begin to organize to advance their rights and interests in the society, sometimes at odds with state officialdom. These groups include business associations, women's associations, human rights advocacy groups, environmental groups, independent labor unions, and many others with special needs, such as the disabled, ethnic minorities, the elderly, and otherwise vulnerable classes. Westerners are familiar with the interplay between advocacy groups and the democratic political process, and often criticize the excesses of "shadowy" influence peddling or radical activism. In the transitional countries, learning to be independent, to take action, to educate and to advocate for rights is still new. Much of the effort of foreign assistance has targeted these groups in an effort to increase their power and effectiveness in educating the public, influencing governmental decisions, and when appropriate, seeking justice through the court system. Investing in these types of programs became increasingly attractive in Ukraine as the top-down programs did not result in the expected impacts.

Perhaps the earliest effort to develop a bottom-up, grassroots program in Ukraine was through CEELI's support of Environmental Public Advocacy Centers (EPACs), established in 1994. USAID also supported the efforts of the American Center for International Labor Solidarity (ACILS) (active in Ukraine from 1994 – 99) to provide legal representation for workers in Ukraine. USAID has also been a long-time supporter of IREX/Pro Media, which has helped to defend journalists in Ukraine since 1994. After USAID decided to pursue a more grassroots approach to legal reform in Ukraine in 1999, it broadened its support for these types of programs, working on human rights issues more broadly. Each of these programs has been successful. They have provided meaningful assistance to Ukrainian citizens, and have helped to force the judicial system to do the job it is supposed to do, of protecting individual rights and of forcing the state, as well as the citizen, to comply with the law.

a) EPACs

Environmental activism was one of the first forms of independent citizen organization to emerge in the former Soviet Union. In Ukraine, the meltdown of the Chernobyl nuclear plant galvanized the public like no other issue, and a progressive environmental law was one of the very first passed by the independent Ukraine parliament in 1991.

The Ukrainian environmental movement has achieved a strong NGO and legal voice through the establishment of EPACs in L'viv and Kharkiv, and EcoPravo in Kyiv. These organizations grew out of the joint initiative of Ukrainian environmental lawyer/activists, who were encouraged by the 1991 law and wanted to make it work. The EPACs were taken under the wing of CEELI, which has been funding them, to various degrees, since 1994. Each EPAC has taken a somewhat different path, but all have expanded and adapted their legal efforts to meet changing challenges. The basic formula is to have open clinics to hear complaints from citizens and other organizations related to possible environmental misbehavior, either by government or by private interests. Cases are reviewed, and a certain number are selected for filing and further litigation in the courts.

The growth of EPAC activity is reflected in the caseload. The L'viv EPAC attorney stated: "When we began in 1992, we had five clients per month. Today, we have 60 per month." The L'viv strategy is to file many cases, while the Kharkiv EPAC is more selective, taking on more complex cases over time. According to the Kharkiv respondent, they normally manage 10 court cases per year, but their role is changing from representing claimants in court to doing more and more defense work, representing NGOs and individuals charged with defamation. He said: "In one case, a publication accused a company

owned by Mr. Lazarenko [currently being held in jail in San Francisco] of unlawfully dumping waste. The journalists were sued for defamation, and we defended them, winning on appeal.” “In another case” he went on, “a journalist was sued for damaging the reputation of a corporation and harming its business interests. We also won that case on appeal.” This improving record of success, according to the L’viv attorney, has encouraged people to turn to the courts. “Public awareness and public confidence has increased,” he said.

Several exogenous factors contribute to the success of the EPACs: a clear and popular issue, a good framework law, and a strong international agreement signed by Ukraine. On this last issue, Ukraine recently signed the 1998 Aarhus Convention establishing the right to citizen access to information regarding the environment, and has emerged as an important tool in environmental litigation in Ukraine. Donor support has also been a key factor to the success of the EPACs. In addition to the support provided by USAID/CEELI, the OSCE has provided support for EcoPravo Kyiv, and the Dutch, the Canadians and the EU have provided funding to many other environmental organizations that coordinate with the “legal” arms of the movement.

Donor involvement, however, has sometimes been a rocky road for the EPACs. Considered in 1999 to be one of the more successful parts of the USAID funded CEELI program, by 2000 USAID had begun to argue that EPACs were too expensive and not really contributing to rule of law, and that tighter budgets were going to require some cutback of support. This seems to have been resolved, but the threatened loss of the support of the United States has activated the centers to diversify their funding. Still, according to one EPAC lawyer, donors “often came in without any understanding of our situation, and they did not take time to learn. Also, programs are not stable, donors keep searching for tangible success, often investing in writing laws. The problem is *using* law to advance societal interests, which takes more time and consistency of effort.” These criticisms notwithstanding, the same respondent said: “Donor coordination is getting better. We would hope that it would reach a point where all could agree on one financial and substantive reporting format, for instance. For all of us having to have reporting and accounting procedures for different donors is very costly, because each has different requirements . . . our transaction costs are very high.” The good news is that the EPACs have diversified their funding base, and the prospects for long-term sustainability are good.

b) ACILS

When Ukraine became independent, it inherited a Soviet labor code and a Soviet organized confederation of trade unions. In formal terms the ‘working class’ was in a highly favored position, although in reality, the CP’s greater interest was in keeping factories running smoothly, rather than supporting an independent labor movement. As Ukrainians turned to the West in 1991 for ideas, models and new ways of doing business, it was natural for interest to develop in the concept of a free labor movement and organization, capable of advancing the interests of labor in the context of a rapidly privatizing free market economy. For the United States, the primary instrument of support and technical assistance for the Ukrainian free labor movement was ACILS, which began its Ukraine program in 1994 with a legal assistance program as the centerpiece of its overall effort. Lawyers hired by ACILS and working in resource centers in Kyiv, Mykolayiv, Donetsk, and elsewhere, provided consultations and representation to workers on issues such as obtaining back pay, restoring people to their jobs, obtaining social welfare, and cases relating to executing contracts.

A 1999 evaluation of ACILS conducted by MSI found that the ACLIS legal assistance efforts had been remarkably successful in providing legal advice to a growing number of trade union members, many of whom were in trouble because of their efforts to form free trade unions in opposition to the Soviet era labor unions. Both the number of lawsuits filed and the number of cases won with ACLIS support grew dramatically from 66 and 10 in 1996, to 159 and 85 for the first six months of 1999. According to the

evaluators “interviews with clients in the regions confirmed the overall success rate of the ACLIS lawyers . . . We heard repeated stories of how the ACLIS lawyers had obtained back pay or had helped restore clients to their former jobs.”³⁰ The evaluation also found, however, that the success in winning court cases for free trade union members did not result in a permanent increase in FTU membership, and funding for the ACILS program ended in 1999.³¹ During an interview with an FTU leader in 2002, he said that FTUs have remained small, but retain their leadership role in establishing standards and winning court cases. Moreover, it is clear that workers still are going to court, and are winning cases, in an effort to obtain back pay, pensions, and other benefits.

c) IREX/Pro Media

Justice for the media in Ukraine has been a complex, contentious and highly visible issue. A truly independent media, whether print, radio or television, is problematic in any country. In Ukraine, journalists, newspapers and TV stations have all been sued for libel and defamation by politicians and oligarchs, with damages being sought at a high enough level to put the media outlet out of business. In 1999, 2,250 such libel cases were filed. Along with tax inspections, withholding licenses and other state means of intimidation, the state has effectively created an atmosphere of self-censorship broken only by a few, less visible outlets. Courts, according to the Ukrainian Union of Journalists, rule 2 to 1 in favor libel plaintiffs, sometimes awarding extraordinary damages. And, of course, the murder of the journalist Gongadze has heightened tensions and raised the stakes.

Journalists, however, are fighting back. With the support of IREX/Pro Media, Ukrainian lawyers and journalists have established a Media Legal Defense Council that provides free representation to journalists and has developed a strong track record. Of the 93 cases IREX/Pro Media was funding as of May 2001, 56 (57%) are still ongoing. In the 37 cases for which we have decisions, the complaint was dismissed in 15 cases, or 40 % of the matters. As a result, the media "saved" \$5.4 million in damages they did not have to pay. In other cases, the matter was settled out of court, the plaintiff withdrew his complaint, or the judgment for the plaintiff was reversed on appeal and the case was remanded for a new trial. As discussed above, IREX/Pro Media was also instrumental in convincing the SC to issue a guiding opinion that can be used to limit the amount of damages awarded against media outlets. In addition, IREX/Pro Media trains judges and lawyers concerning the decisions coming out of the European Court of Human Rights that also limit plaintiff awards against journalists and the media. IREX/ProMedia has also established a Media Bar Association to continue this work after IREX/Pro Media departs.

Although IREX/Pro Media may be a USAID success story, the Gongadze case indicates that when the truth cuts too close to the bone, extra-legal action can still be taken to bring the media into line. While some progress has been made, the conditions for realizing a free and independent media in Ukraine are far from secure.

d) Human Rights

The development of a human rights advocacy and protection movement in Ukraine has been a substantial achievement since independence in 1991. The European Convention and the concomitant access to the court in Strasbourg have had an important effect on human rights protection in Ukraine by providing an additional judicial venue for human rights cases and by establishing case law on human rights issues that may be used to influence the Ukrainian courts. Failure to meet European standards,

³⁰ ACILS Evaluation, MSI, 1999, p.14. It should be noted that one of the authors of this report also was on the team that conducted the ACILS evaluation.

³¹ A similar, but larger and more successful, ACILS program continues in Russia.

moreover, results in international criticism and delay in advancing Ukraine's foreign policy objective of becoming a full member of the European system.

The use of the Strasbourg court by Ukrainian Human Rights groups is remarkable. The Court's liaison office in Kyiv reports there are 19 cases currently pending in the court from Ukraine. The 2000 US Department of State Country Report on Human Rights Practices reported that over 13,000 human rights cases have been filed in the Strasbourg Court, with "some 200 being accepted for review." (P. 17).³²

Foreign assistance in the human rights field has been extensive, broad-gauged and multi-donor. USAID, the OSCE, the EU, DFID, the IRF, and others have mounted various forms of human rights support programs, especially since 1996. These programs have been mostly indirect in nature, focusing on broad campaigns of education for citizens and leaders alike, usually through support to NGOs. Some have been direct, such as the ABA/CEELI program in human rights, now in its third year. The CEELI program has supported the Kharkiv Expert Consultation Center by providing funds for lawyers to take on complex cases before the courts. To date the Center has handled over 100 human rights claims in Ukrainian courts. According to its spokesperson "we have won every case we have taken on, or filed an appeal to Strasbourg . . . generally we take on cases we believe we can win." In collaboration with the IRF, CEELI is also supporting in-country training for lawyers and judges on human rights and the European Convention. Another CEELI project has linked a group of 128 human rights activists over the internet, who share information concerning cases, laws, and problems.

The impact of these activities on the performance of the courts with respect to respect for the procedural and fairness standards in criminal cases is difficult to measure. There is evidence that a growing percentage of cases involving rights of accused are dismissed by the courts for want of evidence or proper procedure. One appellate court judge, formerly a prosecutor, reported that more and more cases are being dismissed, after first being returned to the prosecutor for further investigation. It is certainly the case that judges at all levels have become very aware of the procedural requirements of a fair trial, and of the role of the Strasbourg court as a standard setter for Ukrainian courts. Nevertheless, and again as highlighted by the Gongadze case, much remains to be done before human rights can be said to be well respected in Ukraine.

e) Small and Medium Sized Enterprises

Obtaining justice for the business community presents a different set of challenges. The difficulties businesses have in surviving the maze of regulations, tax rules, and extra legal visits from the myriad of inspectors are legendary in Ukraine. The absence of a clear civil and commercial code, the long delayed reform in taxation, and the view that local businesses are merely "cash cows" for bribery or extra-legal taxation all contribute to the obstacles that businesses face. In 1999, a member of this team interviewed an NGO that had helped 10 women open small enterprises. On this visit, when asked what had happened to them, he was told, "They were all put out of business by the tax police and other regulators. They gave up." Access to justice for the small and medium business owner in the Ukraine has

³² Most relate to violations of Article 6 concerning the right to a fair trial (regarding the denial of the appearance of certain witnesses, or the failure to keep a transcript of the trial), but others are also filed regarding article 3 (prohibiting torture) and article 5 (prohibiting unlawful imprisonment).

been a matter of paying off one or more of the 34 different taxing, regulatory and licensing agencies capable of putting one out of business.³³

BIZPRO, a USAID contractor, has developed two means of responding to these problems. The first, the Business Hotline, provides emergency advice and a lawyer referral service to those SMEs who call in with problems. The Business Hotline received over 4000 calls to 24 regional hotlines throughout Ukraine in 2001. Taxation issues were the number one concern, followed by registration, licensing, and inspection. The second organized response is called “The Legal Ambulance.” When an SME receives an “unscheduled visit” from a government inspector, usually for the purpose of eliciting a bribe, the businessperson can call the local business association, which dispatches another business leader or a lawyer or other trained person to confront the inspector. More often than not, the inspector departs, unrewarded. Eventually, BIZPRO reports, the message gets out.

Also in the economic realm, it should be noted that the Commercial Law Center of Deloitte & Touche has been conducting a series of programs that have trained approximately 1,360 lawyers and business people on business law, mostly in Kyiv but also in regions outside the capital.

f) Gender Issues

It is somewhat more difficult to generalize about the success women have had in accessing the justice system on women’s issues in Ukraine. The main issues women confront, according to one organization in Western Ukraine, are economic discrimination, domestic violence, and trafficking. With assistance from foreign donors, a number of centers have been organized in the Ukraine to address these issues. One center had recently hired a young lawyer to begin a program of legal counseling for women. She reported that the demand for her services had quickly exceeded her ability to handle the caseload, and they were adding additional lawyers, including some from the local CEELI supported law school legal clinic. It is likely that women’s centers offering legal advice will experience the same kind of growth and, hopefully, success rate as those of other public interest NGOs offering legal consultation services.

g) General Social Services

By singling out the above special interests for more detailed examination, we are mindful that the establishment of legal services programs is not limited to these groups alone. The IRF made grants in 2000 to 24 social service NGOs to establish or expand legal consultation programs to their clients. These NGOs are concerned with a wide range of issues, ranging from rights of minority ethnic groups to rights of the disabled, the unemployed, veterans, children with learning disabilities, and the elderly. Clearly there is a growing demand for legal consultation services in the Ukraine, which is manifested in the expanding use of the courts to seek redress, largely against the failures of the state to uphold its end of the social contract most Ukrainians believe they have.

2. Public Education

Neither USAID nor other donor organizations, to the knowledge of the team, have engaged in large-scale public education campaigns in Ukraine. ARD/C, in collaboration with the Eurasia Foundation, did provide grant support to 28 Ukrainian local level organizations who planned to use the funds to advance citizen legal education, and to provide various forms of legal consultative services. Several organizations also publish pamphlets regarding citizen rights in certain substantive areas, such as

³³ Despite these challenges, the number of small and medium sized enterprises (SMEs) in Ukraine is growing. According to a 2001 survey of SMEs conducted by BIZPRO, employment growth occurred only in the SME sector, while employment in the micro and large business and industry sector declined over 1999.

human rights and anti-trafficking and the environment. And some support has gone to the Ukrainian Legal Foundation's efforts at public education and to develop a public law library, as well as to the Street Law program through which law students teach high school students civic education courses. It is notable that public education was not made a priority even after USAID decided to pursue a grassroots program. It is unclear whether this was because of the expense, or because there was a perceived lack of need. It might, in any event, be useful to determine whether there is an unmet need in this area, whether relating to specific rights, or the development of grade or high school textbooks, or the dissemination of mass media materials.

3. Bar Reform

Between 1994 – 95, CEELI engaged in a, in hindsight, misguided effort at bar reform in Ukraine.³⁴ CEELI's workplan included organizing a unified bar, on the model of the American Bar Association, that would include as members judges, courtroom lawyers, in-house attorneys, and prosecutors. The unified bar would issue ethical guidelines, provide continuing legal education (CLE), and handle admissions and disciplinary issues. Some Ukrainian lawyers, in particular from the existing collegia of advocates, strongly opposed this initiative, who saw it as an effort to impose an American model on Ukrainian conditions. Neither CEELI nor USAID understood the political opposition that this proposal provoked, based on the strong traditional division amongst the various sectors of the legal profession in Ukraine. As one representative of the advocates said, "We viewed this as the end of the independence of the advocates." After the expenditure of some money and more political capital, the effort collapsed.

There are some useful lessons to be learned from this experience. At the time that CEELI was pursuing its bar reform program in Ukraine, it was under pressure from USAID/DC to "institution build," as a part of an otherwise admirable mandate to leave something behind when programs close down. CEELI rather reflectively turned to its mother institution, the ABA, for the model of the institution it would build. It then tried to force its Ukrainian partners to accept a model that was, both literally and figuratively, foreign to them. The lesson is tripartite: First, institution building should not take precedence over the substantive needs of the country. In other words, pursuing an institution-building agenda should not drive the program so much as meeting some other need, such as providing representation to an under-represented segment of the society. Programs that lacked institution-building components but provided services to citizens, such as the ACILS program, may be of greater value than creating institutions, even though the latter form of assistance is an "easier sell" to the report readers back home. Second, if an institution is to be built, it should be structured according to indigenous needs and, if possible, without posing a threat to pre-existing indigenous organizations. Third, at least at this point in the development of the former Soviet Union, organizations that are structured around causes, whether for the protection of human rights or the environment, may have better chances for success than those that are structured simply around professions.

Since the bar reform effort, CEELI has been able to largely repair its relationship with the advocates, helping to draft their code of conduct.³⁵ CEELI has also provided important and timely assistance to the advocates' efforts to develop CLE programs, in particular on human rights issues. Despite the ups and downs of the relationship with CEELI, the bar seems to appreciate its presence. One

³⁴ One of the members of the team worked for CEELI at the time and was briefly involved in these efforts.

³⁵ While grateful for this assistance, one representative of the advocates complained that CEELI overstated its involvement: "There was a small scandal when we received from the COE a letter with the CEELI report saying that it had drafted the code of conduct. But we had drafted it for over three years. And there were consequences: an open letter in a legal newspaper that said that the advocates were being threatened by an American code of conduct. We had to spend a lot of time proving that this was not true and that we were following a European model."

bar leader noted that it is useful to have a different perspective, so that we don't just "keep cooking in our own sauce."

V. LEGAL EDUCATION

A. Current Status

Legal education in Ukraine has undergone some significant shifts since the demise of the Soviet Union, but also continues to face some important problems.

1. Demand and Accreditation

The most important change has been the increase in popularity of legal education, with a concomitant increase in the number of law schools. This in turn has presented a challenge to Ukraine in how it will monitor the quality of legal education, and ultimately the quality of the lawyers who practice there.

According to the Ministry of Education (MOE), in 1990, there were four major law schools, all state institutions, in Ukraine: Kharkiv, with 3,000 graduates per year; Kyiv, with 400 graduates; L'viv, with 500 graduates; and Odessa, with 500 graduates. These schools in total graduated about 4,500 young lawyers each year. There are now 164 law schools, graduating perhaps as many as 20,000 people every year. The Kharkiv Law Academy alone has 15,000 students, about half of whom attend full time, the others attend part time or by correspondence.

The explanation for this explosion in the number of law schools in Ukraine, and for that matter across the former Soviet Union, is elusive. One expert explained that the paradigm for education has changed, and that you no longer get assigned a job after graduation, as under the Soviet system, but that you have to market yourself, and law degrees are seen as being highly marketable. Others noted that many of the state institutions, such as the police or the customs service, which are seen as providing good and secure jobs, require an undergraduate degree in law.

In any event, establishing a law school is profitable. The schools, most of which are pre-existing state institutions that did not offer law degrees before, only need to hire staff and find teaching space; they do not need laboratories or other equipment. Many – at least half – of the students pay tuition, which can range from \$ 1,000 to \$ 2,500 per year. This can add up to a significant amount of money if the school has 100 students attending for three to five years each.

The problem, of course, is assuring quality. This is a particularly important issue because, pursuant to a recent CC decision, any graduate of a law faculty may act as an advocate in court. This has generally been true for civil or commercial cases, but previously only a licensed member of the advocatura could represent clients in criminal matters. This now has changed, making it all the more urgent that Ukraine provide some guarantees concerning the quality of the education that its many graduates receive. Currently, law schools must undergo a licensing procedure, and then may elect to be accredited if they want to issue a state-approved diploma.

Under the licensing process, the MOE looks for certain minimal requirements relating to the numbers of teachers, the percentage of them that have scientific degrees (Ph.D.s), the size of the library, the numbers of computers, the size of the premises, etc. Accreditation involves testing graduates, selected on a random basis, to see if their level of education meets certain state requirements. Accreditation is then received for five years. According to the MOE, only 19 private schools have been accredited, while 98

state schools have been. In 2001, the MOE conducted a broad review of the schools, but revoked the licenses of only three. Several professors reported that the license is easy to obtain. One said that maybe 20 – 30 law schools really comply with the requirements – the rest are based on corruption. Another Kharkiv professor said that it is “essential” that you pay a bribe for a law school license.

Whatever the case, it is clear that there are too many law schools in Ukraine for a country of its size, even if one considers that it is an undergraduate education, and it seems clear that the MOE is not rigorously reviewing the licenses and accreditations of Ukrainian law schools. Although the market will likely weed out the lesser schools over the course of the next ten years, in the meantime a large number of under-prepared and unqualified law schools graduates will be unleashed on an unknowing population.

2. Admissions and Grading

Some professors reported that admissions and grading are also marred by corruption and nepotism.

As noted above, some students pay tuition, while the state covers tuition costs for others. The split is about 50 – 50. Admissions standards differ according to whether you can afford to pay or not. At Kharkiv, historically the best law faculty in Ukraine, according to one professor, if you agree to pay full tuition, you will get in: you only have to undergo one interview, and prove that “they are not out of your mind.” To obtain admission to Kharkiv with state support, you need a letter of recommendation from the court, the procuracy, or some other state agency; have no criminal background; and good grades in high school. Then you take three examinations, on history, basic law, and language.³⁶ After you graduate, you are supposed to return to the institution that wrote your recommendation and work there for three years. This, reportedly, has been the system in Kharkiv “forever.” It is important to recognize that Kharkiv has traditionally been the main school for training judges, prosecutors, and state employed bureaucrats. Indeed, with state support the law faculty at Kharkiv has recently opened a special training center for prosecutors, as well as an institute that provides one year of additional training to future judges.

A private law faculty in Kyiv, Kyiv-Mohyla (K-M), has taken a different approach, and one that seems unique to Ukraine. It has established a written, multiple choice entrance examination, covering seven disciplines. The top 2/3 scorers receive state support, and the remainder do not. K-M admits only about 70 students each year, receiving about 13 applications per “free” seat. Interestingly, in a recent poll, K-M took first place out of 180 schools reviewed.³⁷

Examinations at all the law schools, following the continental tradition, are oral. Several professors reported that this system is open to corruption, or at least nepotism and favoritism. One professor wondered how, if professors are paid as poorly as they are, his colleagues could all afford expensive cars. Another professor summarized the prevailing view: “If the students don’t want to study, let them pay!”

3. The Curriculum, Textbooks, and Professors

The curriculum in Ukraine is still largely mandated by the MOE, which reported that 70 % of the courses taught, many of which are non-law related due to the undergraduate nature of the program, are mandatory.

³⁶ Another professor at Kharkiv reported that while you don’t need to pay a bribe to get in on the non-paying track, nepotism and contacts do help.

³⁷ See www.liga.net.

Schools generally offer at least three levels of degrees. Graduates from the three-year program are called junior specialists, and become mostly clerks or other relatively low level functionaries. Graduates of the four-year program obtain a “basic degree,” and may work as in-house counsel or as business consultants (jurisconsults). Graduates of the five-year program obtain a specialist degree, and may join the advocatura. Some schools also offer masters and Ph.D. degrees.

Although Ukraine’s law schools have been criticized for their conservatism, it must be noted that many new topics, such as business and commercial law, human rights, ethics, and international treaties, are being taught, albeit mostly as electives. Three professors interviewed at Kharkiv teach topics (business law and environmental law) that did not exist 10 years ago. Regarding commercial law, the professors believe that the curriculum sufficiently reflects societal needs, offering 11 courses on business law, international private law, banking, international transactions, corporations, securities, intellectual property, investment law, and trade law. Some issues, like bankruptcy, that ought to have their own courses do not, and are sought to be covered in other classes. K-M offers specializations in international commercial law, intellectual property rights, information law, law of the European Union, and the theory and practice of legislative drafting.

The main problem is that there are not enough decent textbooks for these topics. One professor says he begins his courses by telling the students all of the books they should not buy. Unfortunately, most professors do not have enough time to write textbooks because they are not entitled to sabbaticals, and because they are underpaid (reportedly \$ 60 – 80 per month), and so must teach at several institutions and practice law. One professor reported that a friend of his taught at eight institutions. Another professor complained that he was always “running off to court.”

4. Teaching Methodology

The teaching methodology in Ukrainian law schools is also a subject of great criticism. According to most observers, it consists of lectures (which the students do not need to attend), seminars at which students repeat what they heard at lectures (assuming they attended), and practicums: assignments, like internships and generally to state institutions, where the students have little opportunity to gain any practical knowledge or experience. Although several professors complained that the MOE controls the way courses are taught, the representative of the MOE indicated that the school can determine the method of teaching.

Several schools have introduced clinics, and are trying to convert the “practicum,” which one described as “useless,” into clinics. One dean reported that clinics are not such a foreign concept: when he was a student in Kharkiv 30 years ago, he and his classmates would go to Siberia during the summer to help build roads, and would also provide free consultations to pensioners. “What is new is that it should be organically included into the training programs. But we need financing, premises, and MOE approval.”

K-M established a clinic two years ago, initially based on cooperation with CEELI. Five students started working with the Association of Women of Ukraine, providing free legal advice to women. Later, in cooperation with the College of England and Wales (through a three-year funding program), K-M created a more formal clinic. The College provided methodological assistance, as well as video equipment and computers. Starting in 2001, 20 students were admitted into the clinic on a competitive basis (there were two applications for each place). The clinic advertised in the newspapers and the radio, enjoying a surge of interest after the director was interviewed on a radio program. Since that interview, in September 2001, the clinic had received 130 requests for assistance. It is hoped that the students will be able to represent clients in court, but there are no student practice rules that would allow for that yet. If the students perform well at the clinic, this can be counted towards their practicum requirement. The main

categories of interest are family law, labor law, pension, property law, commercial law, and how to set up a company. Two cases have been brought to the court in Strasbourg. Three professors at the clinic have been trained as supervisors.

Clinics seem to be catching on in Ukraine: one professor reported that he had just seen a story on TV about the opening of a new clinic in Odessa. There are 23 clinics in Ukraine that CEELI knows about, financed either by CEELI or IRF. 17 are currently receiving CEELI funding. Each clinic has about 30 – 50 students. All are affiliated with a law faculty somehow, but with varying degrees of cooperation. Some of the clinics are getting academic credit for their students, for others it is in lieu of the practicum requirement. In some cases, students are acting as advocates, in others they are just providing consultations.

B. Donor Interventions and Impact

The donor community, and USAID in particular, has been hesitant to work on legal education reform. USAID, understandably, has been daunted by the perceived conservatism of the law schools, in particular at Kharkiv, and by the long-term nature of the work. The only real work that USAID has supported has been on clinical legal education, which both it and CEELI see more as a means of supporting access to justice rather than as a legal reform program. It is difficult to criticize USAID for its decision to shy away from legal education reform because, other than with the law school clinics, its few efforts have not met with tremendous success. Nevertheless, ignoring the legal education system can undercut all other efforts at legal reform. If, for example, a student can gain admission or good grades at law school based on corruption or nepotism, how can he be expected to act ethically when he becomes a lawyer, judge or prosecutor?

USAID's main effort at legal education reform *qua* legal education reform involved the 1997 establishment, reportedly with the support of both ARD/C and CEELI, of an Association of Ukrainian Law Schools. According to one dean, it was created because a group of law professors had seen and liked the American Association of Law Schools (AALS) in the United States. But, he reported, "the gap between the idea and the implementation is sometimes as big as a precipice." The first president oversaw three seminars organized at ARD/C at which curricula from other countries were compared to the Ukrainian curriculum. After the conclusion of the ARD/C program, the association went into a period of quiescence, and USAID's efforts to support the association were largely considered a failure. It looked like another example of a misguided effort to transplant an American model (and institution) in Ukraine when the country was not ready for it. (In other words, the Ministry of Education did not see the need for an association, and the association was not strong enough to take on the Ministry of Education). There may now be some movement, however. The old president has stepped down, and the Association actually held a conference in Kharkiv in December 2001, for which the Kharkiv Law Academy covered all expenses (although participants paid for their own travel to attend). At the December conference, new leadership was elected, which is now considering how to re-vitalize the Association. According to one of the new vice-presidents, the current goals of the Association are to exchange experience amongst members, to provide assistance in developing teaching methodologies, and become involved in the process of licensing and accreditation. The challenges it is facing are the lack of funding and the need to convince the MOE that it should be involved in the accreditation process. These are the same challenges it has been facing for quite some time, but the time may be ripe (after the CC decision) for the donor community, the Association, and the bar to approach the MOE and insist on tighter and more honestly applied licensing and accreditation standards.

The ARD/C program also provided a printing machine to the Kharkiv Law Academy, which it is still using, last year publishing 250 titles and over 2 million pages.

The support of and growth of clinical programs has already been discussed. One particularly noteworthy and commendable development should be emphasized. Two years ago, CEELI, COLPI, and IRF formed a coalition to coordinate work on clinics and Street Law programs. In a departure from the usual practice, these organizations have actually pooled their resources, and hold a joint competition each year to determine which schools will receive the support of the coalition. The coalition prepares one report for all their funders. The group has also jointly developed a manual on clinical legal education. Each donor of course has different priorities and requirements: CEELI, because it is interested more in access to justice, wants to support live client clinics, whereas IRF and COLPI are more focused on educational reform and insist on a close law school connection. In addition, CEELI's USAID funds cannot be given to state institutions and so it tends to support clinics that are NGOs or private institutions. Nevertheless, this degree of coordination amongst the donors interested in clinical legal education is rare, and should become a model for other countries and donors.

Another important impact from the donor community has come from the experiences that many professors have had to study overseas. One professor whom we interviewed was the first person to teach bankruptcy in Ukraine, in 1995. He based his course, his methodology, and his materials on his experiences in the United States. He wrote a textbook as well, but he had to subsidize its publication, and then only 600 copies were published. Another professor had studied in at the Soros school in Budapest, and had studied European law in London, and had also been to the States. Yet another had been to the University of Wisconsin on an Irex program. All valued their experiences tremendously, and argued that the donor community should do more to enable professors to work and study overseas, so that they may develop better textbooks and improved teaching skills for use at home. Providing additional opportunities for professors to study and write, whether at home or abroad, would indeed help to answer one of the most frequently raised complaints, regarding the insufficiency of Ukrainian language textbooks on emerging issues. It would also enable law professors to fulfill their important societal work of critiquing the legal system, the courts, and the government. This work is of particular importance in civil law countries, where professors enjoy an even higher regard than they do in common law countries.³⁸

Some donors have also supported the creation of new law schools or the establishment of foreign law faculties within pre-existing schools. The Ukrainian Legal Foundation created a new law faculty, which is no longer existing, "for a variety of reasons" including, according to one observer, "management problems." Another observer attributed its failure to the fact that it was a part of Kyiv State, and that the traditional law faculty there did not want the competition. A more successful effort appears to be the establishment of the Ukrainian/German School of European Law within the Kharkiv Law Academy.³⁹ This model has worked in other countries as well, including an American law program at the Warsaw State Law Faculty and a French law program at Bucharest State Law Faculty.

VI. LESSONS LEARNED FOR THE DONOR COMMUNITY

Our review of the evidence clearly indicates that since independence, and especially since 1996, progress has been made in Ukraine in all four areas of law reform: legislative framework, judicial reform, access to justice, and legal education. Moreover, this progress has accelerated since the 1996 constitution, the adoption of the European Convention in July 1997, and the parliamentary changeover in January

³⁸ Performing that societal work is not without its risks. One professor who had published an article critical of the presidential referendum was summoned to the office of the rector who had received a call from the administration warning him that his professors should not get involved in politics.

³⁹ Kharkiv also hosts the Ukraine/USA Center to Combat Criminality, which conducts seminars and conferences with the support of the USDOJ.

2000. We also find that the donor organizations have made important contributions to the advances that have been made.

Accordingly, we do not agree with the GAO assessment that U.S. assistance has achieved little in promoting the rule of law in Ukraine. We do, however, believe that the assistance could have been more effective. As noted, one of the ironies of the U.S. program is that it was most generously funded at a time when Ukrainian conditions for moving forward with reform were least propitious. It is hard to avoid the conclusion that the initial donor expectations were unrealistic, that current donor pessimism is premature, and that the reform dynamics of the host country are substantially out of synchronization with the political will and financial commitment of the donor community.

The following summarizes lessons learned relating to assistance sequencing, targeting, modalities of assistance, and donor coordination.

SOW E&E/DG Assistance Targeting Issues

- At the time it was provided, did ROL assistance provided address the principal constraints at the time to legal system development? If not, why not? Was targeting adjusted over time?
- Was assistance targeting appropriate in terms of type of assistance provided, parties assisted, and duration of assistance?
- Would assistance have been more effective or had greater results if certain areas of assistance/assistance recipients had been targeted that were not? E.g., should more attention have been focused on the governmental vs. non-governmental sector assistance; greater investments in institutional capacity building versus law drafting; to enforcement issues; long-term vs. short-term training; public defender/legal aid programs; defense counsel training; ADR; programs directed at changing the underlying legal culture; or programs designed to build government consensus on/capacity for broad legal system reform?
- To what extent did assistance recognize, target or deal with any gender issues arising in the administration of law? Were there gender issues that were not addressed by assistance programs that should have been? Why not? Was assistance more or less effective in achieving results because gender concerns were or were not factored into rule of law assistance programs?

A. Sequencing and Targeting

The Team has some serious concerns with USAID's assistance sequencing and targeting in Ukraine, in particular regarding the early work with the Rada and the lack of emphasis on legal education reform.

Regarding the Rada, it is unclear why, between 1994 and 1996, USAID allocated at least one million dollars each year (see Annex A) to a project (PDP) that was supporting a parliament that was not reform minded. While a small parliamentary project may have been appropriate in terms of developing contacts pending a political breakthrough, the Team concludes that there was little impact shown for the amount of money expended. This was due not to any fault of PDP's, but to the simple fact that the Rada was not ready to absorb the assistance that was being provided, in large part because it was still dominated by the CP. USAID and PDP should have taken a more objective view of the political realities, and husbanded resources pending political change. The money that was spent on drafting specific laws, such as the civil code, through the ARD/C program, likewise does not seem to have been well spent because the gap between the art of legislative drafting and the reality of politics remained unbridged. Moreover, as one respondent pointed out, it is difficult for outside organizations to maintain pace with the ever-changing priorities in the Rada. Commentaries on draft laws are often prepared too late, or based on an obsolete draft, and accordingly have little if any impact. To the extent that USAID continues to

support legislative drafting programs, it should also do more to address the issue of implementing legislation by combining substantive drafting and training programs instead of supporting stand-alone legislative drafting efforts. It would likely be more useful for USAID, at this point, to support the harmonization and simplification of the legislative framework, which also is a key to combating corruption.

USAID's support for the judiciary, on the other hand, does seem to have been appropriately targeted and sequenced. The judiciary was a struggling entity in 1993, and although problems remain the higher courts are becoming more respected and trusted by the citizens and are playing a larger role in delineating Ukraine's democracy. Although linkages are difficult to demonstrate, USAID – through the training programs, equipment provision, and other activities – helped to put the judiciary on the map. USAID's decision to suspend assistance to the judiciary pending the passage of the law on the judiciary, however, was probably ill-timed and precipitous. A smaller scale program that would have targeted the training centers, helped them to develop more reproducible curricula, and address their sustainability concerns would have been appropriate. Such a program could also have provided a more consistent presence of judicial experts on the ground, which in turn *may have* resulted in a more salutary law on the judiciary.

USAID's effort (through CEELI) to develop a centralized bar on the American model was misguided, and was appropriately dropped. Again, a better understanding of the local needs and conditions would have avoided this mistake.

Another area of concern relates to the law schools. Despite the conservatism of some of the law schools, this is still a vital piece of the puzzle that neither USAID nor others in the donor community are really addressing, except through the clinical legal education programs. As an earlier MSI assessment stated, "Reform of legal education is critical for the long-term goal of strengthening the rule of law in Ukraine."⁴⁰ Indeed, legal education is the starting point for all judges and lawyers, and most legislative drafters, and supporting change in this area will lead to more innovative thinking in these other areas. Supporting programs that bring more western law professors to teach in Ukrainian schools, fostering more institutional linkages between Ukrainian and western law schools, and providing more opportunities for Ukrainian law professors to study and write overseas are actions that would not necessarily be expensive, which even the conservative law schools may join in, and which would result in long-term positive benefits. In any event, some of the more liberal schools should receive more international support and attention.

Finally, USAID should be commended for its support of advocacy programs. USAID was correct in assessing that Ukraine's governmental institutions were largely "stuck," and that advocating for change from the grassroots level would be a better allocation of resources. These programs force judges to do what they are supposed to do, and can lead to greater public trust in the court system. The substantive topic addressed (whether human rights, media, or environmental law) is less important than the fact that lawyers are learning how to use the court system for societal change, and that the courts are being responsive to that need. USAID/Ukraine and its program implementers are fortunate in that Ukraine has signed international treaties and covenants, such as the Aarhus Convention and the European Convention on Human Rights, that the advocates can rely on in their presentations to the courts. Linking these advocacy programs with training for judges on these international obligations, as the donor community is doing in Ukraine (consciously or not), engenders a salubrious "push me – pull me" effect, again resulting in developing a more independent judiciary while protecting individual and societal rights.

⁴⁰ MSI Ukraine Rule of Law Assessment and Strategy Recommendations (June 1999), p. 24.

Investments in generating demand and in advocacy programs had impact, especially when focused on critical issues such as press freedom, exploitation of women, regulation of small and medium enterprises and environmental degradation. Over time, these “bottom up” programs appear to have put so much pressure on the judicial system that the system itself began to respond. While such bottom up programs can look like “fairy dust” when viewed in isolation, they can have important impact over time and, taken together, can play an important role in promoting system change. A bottom up strategy may be virtually the only option for rule of law engagement when political commitment to structural reform of the judiciary is very weak or non-existent. However, it is an incomplete strategy if the expectation is for quick results in establishing a modern legislative framework and an effective and fair judicial process. Ways must be found to stay engaged in “top down” reform relationships, even in the absence of reform. Breaking relationships with the judiciary and working only outside the system is likely to be inadequate and will miss opportunities to affect thinking as conditions begin to change. At the point that change occurs, donors might then be poorly placed to take advantage of it.

SOW E&E/DG Assistance Modality Effectiveness

- What types of rule of law assistance have been the most effective in achieving results?
- Has this been true throughout the region or has it been largely country-specific? Which have been the least effective? Has this been the pattern in the region (or at least in the countries studied) or has it been country specific?
- What factors have made certain types of rule of law assistance more/less effective in achieving results? Are these factors common from one country to another or have they been largely country-specific?
- Within the basic types of assistance provided, have certain modalities of assistance been more effective than others in achieving results? E.g., when assistance has been provided in the form of training, has a certain type of training (i.e., long-term vs. short-term, overseas vs. local, group vs. individual; institutionalized vs. ad hoc training; use of judges vs. law faculty trainers; etc.) been more/less effective in changing attitudes or serving as a catalyst for change within the legal system? Is this true throughout the region (or in the countries studied)?

B. Modalities

The essential and unsurprising finding of the Team is that successful programs incorporate all forms of assistance modalities. The modalities should not be considered as stand-alone elements. The linking of training and technical assistance to the possibility of direct action seems to be a key feature of the more successful donor assistance programs. At a relatively low cost, those programs that find committed people, such as the lawyers who began a human rights legal clinic, train them and give them some equipment to help them do what they are already committed to do, seem to work best. Training unconnected to follow-up action seems to have the shortest half-life, as people remember the training course, but have little opportunity to practice what was learned.

1. U.S. Based Trainings

As noted in the section on judicial reform, U.S. based trainings clearly made a lasting impression on the judges who participated in them. One chief judge, described above, was motivated by his trip to the U.S. to computerize his entire court. Together with the equipment provided and the follow-up in country training, these programs also contributed to the establishment of the judicial training centers. Other judges seem to have been inspired by the examples set by their American brethren to try to

establish similarly independent courts in Ukraine. Especially in the early days, going to the west and seeing how things really worked in an independent judiciary was crucial to changing the mindset and creating an alternative vision. Even today, for judges at the lower level oblast courts, visiting a court in Switzerland, according to a chief judge, was a revelation as to how things could be. Others pointed to the importance of long-term visits overseas. One foreign lawyer reported, “People come back from a master’s program in the United States, and it is like they are breathing fresh air. Rather than sending change agents here who do not understand the culture, we should take more people out of the culture for a year or two.”

Although U.S. based trainings are the frequent target of criticism (and they are expensive, and do include some people more interested in shopping than in learning), the Team concludes that they have played an important role in helping to foster the rule of law in Ukraine.

2. In-Country Trainings

Also as discussed in the section on judicial reform, the precise utility of in-country training programs is difficult to pin down. Judges who participated in the early ARD/C trainings reported that they were useful, but could not articulate how they had changed their practices as a result. Training that is more closely linked to international standards, such as on human rights, seems to be having a greater impact on both judges and lawyers, who are increasingly reliant on these standards in reaching decisions. While training per se does not seem to have been a catalyst for change, it is an essential link between the catalyst (e.g., an international treaty) and the desired end result (e.g., improved protection of human rights). Linking training, for judges or lawyers, to other program elements, whether in the legislative drafting or the advocacy area, should also be encouraged in order to leverage investments and improve the implementation of the law and the effectiveness of the advocacy.

The Team would also recommend that any future judicial training programs emphasize the development of easily reproducible components that address key aspects of the law that can be used repeatedly (and updated as necessary) for newly appointed judges.

3. Equipment and Grants

Provision of equipment is an obvious need in supporting the activities of an advocacy NGO, for example. Greater caution is required when providing equipment to a governmental entity, such as the judiciary. It is ultimately up to the government to provide equipment (and for that matter, training) to judges, and “doing it for them” can foster dependency. The Team found that in some instances equipment that had been provided to the judiciary had not been maintained, or that the government had not met its obligations to provide resources that matched the equipment. Court administration programs, which include provision of equipment, should be developed in close coordination with the government to ensure that the government will follow-up with maintenance and, if it is a pilot program, that it will be rolled out to other courts.

Grants from USAID and others in the donor community are also a vital source of support for the NGO community working on legal reform. ARD/C supported an extensive grants program that made grants to 37 Ukrainian and American organizations and which supported a broad range of activities, from bar reform to public education through the media. It also provided extensive support to the Ukrainian Legal Foundation, which developed a public law library and engaged in public education and parliamentary education activities. Many of the organizations that ARD/C supported are still active, and the grant support was clearly welcomed and helped to foster the development of a vibrant NGO community. One concern in the grant making area is that given the political and economic environment in Ukraine, USAID should maintain a low level of expectation for self-sustainability of these

organizations. If the organization is doing good and useful work and showing impact (as are most of the advocacy organizations described above), USAID needs to be prepared to support that organization for a significant period. While some weaning to foster sustainability is laudable, it should not be emphasized to the extent of abandoning organizations that we urged into existence in the first place, assuming that the organization is performing as required.

SOW E&E/DG Assistance Coordination Issues

- Have rule of law assistance interventions been adequately coordinated with similar activities of other assistance providers (international organizations, NGOs, other bilateral donors)?
- What external or internal (conditions within the host country) factors affected (positively or negatively) the ability of the various assistance providers to effectively coordinate rule of law assistance activities? E.g., to what extent did the presence or absence of a host country strategy for legal system reform affect the ability of donors to provide effective assistance?
- To what extent have ROL programs funded by other providers positively or adversely affected the results and effectiveness of USAID-funded rule of law programs?

C. Donor Coordination

The Team has mixed conclusions regarding donor coordination. On one level, in the area of advocacy and clinical legal education, it was very good. The main players in this area, from CEELI to IREX/Pro Media to IRC, are in regular contact with one another, and their activities tend to complement rather than contradict one another. The reasons for this coordination may be a relative scarcity of funding that forces them and their local partners to coordinate better and a more philosophical commitment to the causes to which they are dedicated.

Coordination on the parliamentary support and judicial reform fronts was not as good. The Team found several instances where USAID grantees, for example, did not know (or failed to inform the Team) that DFID was supporting an extensive legislative drafting program or that the Swiss were working closely with the judicial associations. One has the sense that there is a swirl of activities in these areas, and the groups may be only vaguely aware of what each other is doing, but there is no centralized coordination or information sharing. Ideally, this coordination would be led by the host country, but the Ukrainians do not seem well enough organized themselves or interested in playing that role. USAID may want to consider convening the various donors in these two areas every two or three months simply to share ideas and experiences, and to ensure that all the groups know what the others are doing. To the extent that further work is done in the area of legislative drafting, it will be particularly important to coordinate with any European donors, such as TACIS.

D. Other Lessons Learned

Some important lessons learned have been highlighted in foregoing discussions. We will re-emphasize just a few.

Programs that are true partnerships with Ukrainian reformers work best. We were repeatedly told that while everyone appreciated the opportunity to learn about Western systems, and listen to American and European experts, the donors often exhibited a lack of knowledge and respect for Ukrainian experience and conditions. Too much of foreign assistance was seen as a one way street, a lecture rather than a dialogue, a handout rather than a partnership. It is to the donor community's credit that there now seems to be much more emphasis on true partnership, with Ukrainian partners at all levels shouldering a much greater share of the burden and responsibility for effective promotion of reform. On a related note,

after ten years of reform, there are many talented Ukrainian lawyers and reformists, and an increased indigenization of program implementers would seem to be in order. Acting more as neutral brokers and facilitators of the political process of legal reform may lead to greater success in achieving change as opposed to providing the content of new laws and ignoring the process by which such laws get passed.

Programs that are tied to local political advances or to international standards have a better chance of success. Much of the success of the advocacy programs, as discussed above, have been tied to Ukraine's adoption of a new constitution and accession to the Council of Europe. Likewise, the PDP program seems to have enjoyed greater success after the changeover in parliament in early 2000.

Conditions to reform programs must be carefully structured and broadly disseminated. This is of especial concern regarding the law on the judiciary, discussed above.

Do not structure programs in the expectation of short-term results. Developing the rule of law is long-term work. These programs are helping to change mindsets and societies, which may take a generation or more. Progress, for example, cannot be measured by the passage of one law: it will, in fact, take years to see how a law is implemented and whether it had the intended results. In terms of "institution building," it is important for the donor organizations to understand that if they are going to help to create an NGO, they had better be prepared to stand by it for long time. Self-sufficiency is not likely to occur soon, given the realities of the Ukrainian polity and economy. In that regard, support to fewer and better organizations, including more management and development assistance to the NGOs themselves, may be better than the broad brush approach that was applied in the early years in Ukraine.

Programs that foster dependency will not succeed in the long-term. As has been discussed regarding the ARD/C program, it is up to the government to train judges and provide them with books, computers, and other equipment. Donor assistance should be ancillary and designed in a way that includes a transition to and a commitment from the host government. We cannot "do it for them," and we should look for financial support to flow out of political will. These programs, nevertheless, can be useful for building demand and supporting reform-minded leaders and institutions.

E. Conclusions: Catalysts and "Political Will"

Ambassadors Pascual and Pifer recently wrote, regarding the past 10 years of reform in Ukraine: "If any lesson has been learned, it is that Ukraine's future is its own to define. Outsiders can help or hinder, but their impact is marginal. The principal choices are Ukraine's to make."⁴¹

Indeed, the fundamental course of reform must be set by the host country itself. Domestic political decisions are the most important catalysts – and impediments – to reform. Ukraine is now engaged in a struggle between its stated policy goal of integration into European political and economic structures and the reality of its current Potemkin-democracy marked by human rights abuses. Some of the political advances, including the adoption of the 1996 constitution and the ratification of the European Convention, are quite real, and are provoking enormous change in Ukraine. As one judge said, "The drive to be a part of Europe is a major factor in judicial development and decisions." Another judge said, "Everyone, judges and advocates, are starting to cite international agreements and cases from European courts." It is not surprising that the most successful donor programs are those advocacy projects that are forcing Ukraine to live up to its international commitments. These programs are important, albeit ancillary, catalysts to reform. One could argue that the early years of democracy assistance, when ideas such as separation of powers and judicial independence were really introduced into Ukraine, paved the way for some of the policy decisions that came later. Those days of relatively simple projects designed to

⁴¹ *Ibid. supra*, at p. 175.

share information, however, are long gone. The ongoing development of the rule of law in Ukraine is at a much more complex stage. The political conflict is more subtle, the role of outsiders is more limited, but the stakes remain high.

“Political will,” however, is not the sine qua non of a law reform program. The presence or absence of political will can merely define the scope and expectations of such a program. Even without political will, programs can lay the groundwork for change by helping to develop demand for change and by providing moral and financial support to reformers. In the area of legal education, for example, there is little institutional political will for change. But by searching out reformist professors and deans, one can plant the seeds for reform, knowing that the real harvest may not be reaped for many years to come. Establishing the culture, practice and institutional arrangements of a rule of law system requires long-term, societal, and generational change. As one Ukrainian respondent told us, “you wasted a lot of money trying to retrain old Communists.” Perhaps, but the surprise has been the extent to which judges, lawyers, and law professors brought up under the old regime have been able to grasp the necessity for change and respond positively to the opportunities that have emerged. Moreover, the Ukrainian government is not monolithic: reformist leaders exist within it. Treating a nation still in the midst of a tremendous transition as a monolith risks alienating potential reform allies and inhibiting the ability to respond quickly to political opportunities as they arise. Additionally, the donor community needs to be more nimble to take advantage of political openings as they arise, such as the changeover in the Rada in 2000 or, more recently, the passage of the “small judicial reform.” Given the necessary contracting regulations, this may be a tall order, but perhaps some means can be established to secure funds to enable a rapid response to political development in country.

ANNEX A

ASSISTANCE PROVIDERS

This annex describes the activities of the primary foreign assistance providers in support of rule of law development in the Ukraine. It is not an exhaustive list, nor is it meant to be more than an overview description of the main themes and activities of the various donors.

USAID

The table below sets out the main components and levels of financial commitment of the various USAID programs beginning with a cumulative figure of over \$7.4 million, reflecting the support level for all programs from 1991 through 1994. It should be noted that the figures below include USAID programming in Moldova and Belarus, as well as Ukraine, although Ukraine because of its size and importance received the major share of funding and assistance effort.

USAID's rule of law program became an integral component of its overall democracy and governance strategy in 1996. USAID has relied heavily on three partner organizations for implementing its rule of law development effort, a rule of law consortium led by two US consulting firms, ARD and Checchi, was primarily responsible for developing the capacity and independence of the judicial system, working closely with the Ministry of Justice, the Constitutional Court, the Supreme Court and the Courts of Arbitration or commercial courts. The second major program partner has been the University of Indiana. The university has had a long term program of parliamentary development (PDP), including capacity building, training in legislative drafting, and efforts to improve transparency and accountability of the Verkhovna Rada, the national parliament of Ukraine. The third long term partner in this effort is the American Bar Association Central and East European Law Initiative (ABA/CEELI), an organization created after the collapse of the Soviet System to provide a range of knowledge transfer and technical assistance to the broader legal establishment of the Ukraine and to other former Soviet states. ABA/CEELI uses volunteer American lawyers to implement its programs. CEELI has been active in many areas of rule of law development, but most notably with law and judicial associations, legal clinic development, and support for citizen advocacy and legal access programs in environment and other sectors.

As indicated in the above table, other partners have been active for shorter programs, including another Washington consulting firm, MSI, which mounted an anti-corruption program for several years, the US Congress based Congressional Research Service which developed parliamentary information systems and an internship program, and Search for Common Ground, an American NGO which had a brief training program in conflict resolution. The internship program proved very popular with the Rada, and was folded into the PDP effort after CRS left the field. For a brief period, the Eurasia Foundation, another post cold war institution created by the USG to respond to the need to finance a variety of citizen initiatives and civil society organizations, was responsible for implementing a rule of law grant program, focusing mainly on funding non-governmental organizations and law school students to set up various legal consultation and outreach programs.

Another major effort was the USAID funding of the US Department of Justice Law Enforcement program. This program is not part of purview of this assessment, as it deals with areas of criminal law that are outside USAID's direct mandate. These programs represent about \$1.8 million of the USAID program up through 1996, after which they no longer appear as part of the USAID Mission budget, although the programs continue with ABA/CEELI involvement.

**USAID Rule of Law Program Activities and Obligations
1994-2001**

Project Components	Thru FY94	FY95	FY96	FY97	FY98	FY99	FY2000	FY2001	Total
	Est.	Actual Obl's							
	7,660.077	1,600.000	5,573.826	6,120.000	3,988.733	2,847.513	1,254.689	1,693.250	30,738.088
Legal Assistance ABA- CEELI	848.140	450.000	600.000	900.000	880.000	393.090			4,871.230
ROL Development Program						372.532	676.690	893.250	1,942.472
Parliamentary Development PDP/Part	1,000.000	1,150.000	1,000.000	800.000	750.000	726.630	577.999	800.000	6,804.629
Rule of Law Consortium – ARD/Checchi	4,860.000		3,465.000	3,575.000	1,781.739	555.261			14,237.000
Improve Legal Education						200.000			200.000
Parliamentary Staff Development – FMC				125.000	175.000	200.000			500.000
Dispute Resolution – Search for Common Ground				250.000	252.000				502.000
Eurasia Education				470.000					470.000
Anti-Corruption –MSI			208.826		149.994	400.000			758.820
Parliamentary Assistance – Cong. Reference Svc.	930.759								930.759
Completed Activity	21.178								21.178
USDOJ/ABA			300.000						300.000
7.2.2 Law Enforcement	2.591	1,500.000							1,582.591
TOTAL	7,662.668	3,100.000	5,573.826	6,120.000	3,988.733	2,847.513	1,254.689	1,693.250	32,240.679

Not included under the rule of law strategic objective, but relevant to the larger issue of rule of law development are contractors that have served USAID in the area of commercial law development. At the present time, the consulting firm of DeLoitte and Touche is providing a variety of commercial law services, including the operation of a Commercial Law Center, and the provision of technical advice to the drafting of important commercial laws such as the law on bankruptcy.

Thematically, the USAID program in Ukraine has experimented with various approaches to strengthening the rule of law. It is safe to say that this has been a “learning experience” for all concerned. As in other former Soviet republics, there was little in the Ukraine experience or the history of Russian and Soviet rule that would provide the attitudinal, intellectual and institutional building blocks for a rule of law regime. With hindsight, most observers and activists agree that the early assumptions about what could be done, and how quickly, were seriously wrong. Having Ukrainian judges and lawyers from the Soviet era learn about western legal systems through training and visits was not sufficient to transform a weak and dependent judiciary into something resembling a western rule of law. The overall policy assumption that the west, especially the U.S., could move in massively, lay the foundation for a very different set of political, legal and economic arrangements, and get out within five or six years was clearly naïve and a-historical.

When reviewing program accomplishments, Western nations, especially the U.S., became frustrated with the apparent lack of impact of many of its programs, and moved on to try something else. Once the training and visit phase had receded, attention shifted by 1995 to institution building. The Rule of Law consortium helped create a judicial training center and provided computer equipment and extensive training in various aspects of court management. ABA/CEELI hired an institution building specialist to help that organization with longer-term aspects of its support for legal associations and environmental law clinics. Yet sustainability, commitment, and follow up by Ukrainian institutions remained very problematic.

Two strategic choices seemed to be available to assistance to providers. The first was the top down approach, and within that, several variants emerged. The idea of a top down approach rested on the assumption that unless the senior and highest levels of the government and judiciary were fully committed and effectively engaged in reform, it would not happen. Foreign assistance would provide training, resources, equipment, and moral and, to some degree, political support to the reformers who would then make the kinds of significant structural decisions for reform, and all else would follow. A variant of this top down approach was akin to the economist’s mantra, “get the prices right.” If one could just get good laws written, they could be passed, and, again, all else would follow.

The top down approach, sometimes called the supply side approach, had merit and strong advocates. It is hard to imagine fundamental change without elite commitment and strong political will. On the other hand, as USAID and its partners learned, foreign assistance – no matter how generous – cannot produce elite commitment and political will. And if these are lacking, what does one do? This approach is most closely associated with the efforts of the Rule of Law consortium. In 1998, USAID decided that the consortium, despite its best effort, was achieving too little impact to justify its continuance, and 1999 was the last year of this important, \$14 million effort.

The second choice is the bottom up or demand side approach. Here the assumption is that when people start to demand a service in a democratic, or relatively democratic regime, they will eventually force the system to respond. Embedded in this approach is support for legal services to a variety of citizen interest groups, programs that stress effective advocacy, and, on both the demand and supply side, efforts to improve transparency and responsiveness. The problem with the assumption is that nominally democratic but substantively autocratic and or bureaucratic regimes have many ways to resist and manipulate the supply demand equation, often appearing responsive, for example, passing a new law, but

failing to implement it. And there is little disagreement that a demand side approach takes a long time, progress is incremental and episodic, rarely structural or dramatic, and slow in producing the kind of impact and results demanded by USAID reporting and accountability responsibilities. In Ukraine, the demand side approach is most recently associated with the ABA/CEELI program, but to some extent with the ARD/Checchi program, which funded the Eurasia Foundation's rule of law grant program mentioned above. Also, although not formally under USAID's rule of law objective, the Mission's small business support program, BIZPRO, implemented by DAI and Winrock International, has many elements of demand side/bottom up programming.

An intermediate strategy is one that combines elements of both, perhaps reflected in the argument for a strategic focus on the parliament. By improving the performance, capabilities, accountability and transparency of the Rada, the PDP program is both increasing demand on the executive branch, while responding to the demands of the people who elected it. The difficulty with this reasoning is that most polls indicate that the people's trust and confidence in the elected Rada is very low, and even many Ukrainian elected officials admit that the quality of people elected leaves much to be desired.

Other Donors

The United States may be the largest donor to rule of law development in Ukraine, but other countries are making significant contributions.

- Canadian International Development Agency (CIDA) has maintained one of the most consistent efforts over the post-Soviet era period in Ukraine. CIDA notes in its current strategy document, that it enjoys a unique advantage of “over 1 million Canadians of Ukrainian heritage” providing Canada with “with particular linguistic and cultural understanding which are enjoyed by few, if any, other donors.”⁴² Although Canada's assistance has been self described as “flexible and and multi-faceted” in the past, Canada has chosen to focus on two interrelated sectors, good governance, including rule of law, and strengthening civil society, thereby neatly combining supply and demand approaches. Canada's rule of law program has focused since 1996 on working with senior Ukrainian judicial institutions to train judges in more efficient systems of courtroom management, judicial ethics, and rule of law principles. An important program effort has been the establishment of three model courts. This model court effort, in its second generation now, involves ABA/CEELI cooperation. An interesting feature of CIDA assistance is that almost all of its programs are done through institutional partnerships between Canadian and Ukrainian organizations. For example, the CIDA rule of law effort Canadian partner is the Office of the Commissioner for Federal Judicial Affairs.
- TACIS is the technical assistance arm of the European Union in the former Soviet Union. It has provided a variety of forms of support to rule of law efforts over the decade, including training and visits for legal officials, commentary on draft laws, technical consultancies and support for legal publications.
- OSCE is the Organization for Security and Cooperation Europe. OSCE's assistance coordinator was established in Ukraine in 1999, and has implemented “several programs directed to assist Ukraine in bringing up its legislation, institutions and procedures into correspondence with contemporary democratic requirements as regards governing position of the rule of law.”⁴³

⁴² CIDA, A Path to Reform: Ukraine Programming Framework, 2002-2006, November 2001.

⁴³ OSCE publication, Kiev 2001.

- Both TACIS and OSCE mount relatively small programs, but they are influential representatives of the European community, and the collective authority of the emerging trans-European legal system. Ukrainian foreign policy, in the main, is oriented toward becoming a part of Europe, and European standards in law as well as the decisions of European courts are taken very seriously.
- DIFED, the British foreign assistance department, operates a limited but well regarded training course in legislative drafting. This four-month course is held in London, and is considered something of a prize by aspiring legislative drafting support staff in the Verkhovna Rada.
- Dutch assistance to civil code development and to the development of other codes is frequently cited by Ukrainians and other donors. The objectives of Dutch program are ambitious. Using the Dutch based Centre for International Legal Cooperation as its vehicle, the Dutch program focuses on Judicial Reform and model legislation in the field of civil and labor law. This Centre is unique in that it not only works with Dutch organizations, but with other European institutions as well. Each project involves cooperation with multiple European legal institutions. For example, a project on Strengthening the Capacity of the Judicial System of Ukraine is coordinated by TACIS, but involves the Ecole Nationale de la Magistrature, the Deutsche Stiftung fur internationale rechtliche Zusammenarbeit, and others including the Ukrainian Legal Foundation and the Supreme Court of Ukraine.
- The Swiss bilateral program has proceeded almost unnoticed by bigger donors. Although modest in financial support, the Swiss have helped to establish a Ukrainian NGO, train trainers, as well as develop a longer term training program in Ukraine, with awareness visits to Switzerland, designed primarily for local level judges of the courts of first jurisdiction. At least one Chief Judge of a local court spoke very highly of this little known Swiss program.

ANNEX B

UKRAINE RULE OF LAW ASSESSMENT PERSONS INTERVIEWED

IN KYIV

ACADEMICS

Alexander Biryukov
Taras Shevchenko National University
Tel: 211-4443
email: alexbir@yahoo.com

Kyiv-Mohyla Law Faculty
Myroslava Antonovych, Associate Professor
Volodmyr Suchenko, Dean
Constantine Yemelyanov, Clinic Director
Tel: 416-6073

ATTORNEYS

David Anderson
Proxen
Tel: 220-0506
email: djanderson@ukrnet.net
web: www.proxen.com.ua

Victor Kovalenko
Ukrainian Legal Group
Tel: 268-2427
email: general@ulg.kiev.ua

Helen Kryshalowych
Squire, Sanders, & Dempsey
Tel: 238-8927
email: hkryshalowych@ssd.com

Petro Morgas
Mobile: 80-50-310-8875

Law Firm "Salkom"
Eugen Kubko
Natalia Kouznetsova
Tel: 229-6176
email: nsk@salkom.kiev.ua

David Scott
Baker & McKenzie

Tel: 490-7070
email: kyiv_info@bakernet.com

Tatiana Varfolomeeva
Vice-President
Union of Advocates

Olga Zhukouskaya
Vice-President
Union of Advocates
Tel: 228-3858
email: zhukovska@b-i-m.kiev.ua

BUSINESS COMMUNITY

Slava Bikovesh, Vice President
Union of Small and Medium Sized Enterprises
Tel: 235-6313
email: bvm@smpu.kiev.ua

Valentina Mandryk, President
Association of Retail Trade Enterprises
Tel: 229-2615
email: kra@faust.kiev.ua

Mark Iwashko, Vice President
West NIS Enterprise Fund
Tel: 490-5580
email: miwashko@wnisefk.com

Jorge Zukoski
President
American Chamber of Commerce in Ukraine
Tel: 490-5800
email: jzukoski@amcham.kiev.ua
web: www.amcham.kiev.ua

DONOR COMMUNITY

ABA/CEELI
Elena Buryan, Assistant Regional Institution Building Advisor
Olga Dmytrenko, Rule of Law Program Assistant
Tamara Lashbrook, Regional Institution Building Advisor
Dennis Fitzgerald, Program Manager, Public Integrity Program
Petro Matiaszek, Legal Specialist
Ellen Seats, Country Director
Lynn Sferrazza, Rule of Law Liaison
Kristen Bender, Criminal Law Liaison
Tel: 490-3702
email: Eseats@abaceeli.kiev.ua

Liselott Martynenko Agerlid, Legal Advisor
Ukrainian – European Policy and Legal Advice Center (TACIS)
Tel: 229-0430
email: agerlid@ueplac.kiev.ua

Deloitte & Touche Commercial Law Project
Darrell Brown, Senior Legal Advisor
Valentyna Danyshevska, Director, Commercial Law Center
Justin Holl, Chief of Party
Tel: 490-6575
email: jholljr@clc.com.ua
web: www.commerciallaw.com.ua

Mary Mycio
IREX/Pro Media
Tel: 461-9748
email: myciomar@ipc.kiev.ua
web: www.ipc.kiev.ua

Parliamentary Development Project
Edward Rakhimkulov
Richard Stoddard, Resident Representative
Tel: 254-3691
email: richard@iupdp.kiev.ua

Olga Sandakova
Department for International Development (DFID)
British Embassy
Tel: 462-0011
email: olga@dfid-be.kiev.ua
web: www.britemb-ukraine.net

Richard Shepard, Regional Director
The Eurasia Foundation
Tel: 238-2696
email: rshepard@eurasia.kiev.ua

Eleanor Valentine, Director
Trafficking Prevention Programs
Winrock International
Tel: 238-6292
email: ellie@winrock.kiev.ua

Taras Vavrynychuk, Law Program Manager
International Renaissance Foundation (Soros)
Tel: 216-2596
email: vavrynychuk@irf.kiev.ua
web: www.irf.kiev.ua

Joe Welsh, Chief of Party
Bizpro

Tel: 568-5938
email: joewelsh@dai.kiev.ua

Cordula Wohlmuther
OSCE

USG

USAID
Tel: 462-5678
Chris Crowley, Mission Director
Alexandria Panehal, Deputy Director
Oleksandr Piskun, Democracy Project Management Specialist
Roger Pugh, Commercial Law Advisor
John Schamper, Program Economist
Marilynn Schmidt, Director, Office of Democracy and Social Transition

U.S. Embassy
Tel: 490-4000
Jason Hyland, Counselor for Political Affairs
Alexander Martschenko, First Secretary, Economic Section
Carlos Pascual, Ambassador
David Rodearmel, First Secretary, Political Section
Marie Yovanovitch, Deputy Chief of Mission

JUDGES

Nadia Pukashova
Tel: 293-4585

Irina Shevchenkivsky
Vice-Chair, Shevchenkivsky Local Court
Local Court
Tel: 212-2383

Higher Commercial Court
Leonid Bodanov, Counsel
Vladimir Karaban, Judge
Valentyna Kovtanyuk, Director of Training

Supreme Court
Tel: 293-4597
Oleksandr Volkov, Member of Presidium and Council of Judges
Ms. Lukashova, Head of Legal Department (working on draft legislation)
Ms. Morouska, Acting Director of the Judicial Training Center

MINISTRIES

Volodmyr Domnich
Chief of Administration
Licensing and Accrediting Administrative Department

Ministry of Education and Science
Tel: 216-1535
email: vvv@minosvit.niit.kiev.ua

Anatoly Zayets
First Deputy Secretary of State
Ministry of Justice
Tel: 228-4976
email: zayets@minjust.gov.ua

NGOs

Valentyna Telychenko
Pylyp Orlyk Institute for Democracy
Tel: 290-9587
Cell: 50-312-1377
email: vtelychenko@rambler.ru

Borys Vasylykivskyy
EcoPravo Kyiv
Tel: 228-7510
email: vborys@darkwing.uoregon.edu
ecolaw@ecop.relc.com
www.geocities.com/ecopravo

PARLIAMENT

Serhiy Holovaty, MP
Tel: 227-2207
email: holovaty@akcecc.kiev.ua

Olexandr Kopylenko, Advisor to the Head of the Rada
Tel: 254-0028

IN KHARKIV

ACADEMICS

Yaroslav Mudry National Law Academy
Vyatcheslav Komarov, Vice Rector
Tel: 380-572-45-41-36
email: komarov@ulac.edu.ua
Vsevolad Rechytskyi, Professor, Constitutional Law
Tel: 38-0572-16-19-01
email: seva@ic.kharkov.ua
Professor Irina Selivanova, Professor, Business Law
Professor Viktor Shakov, Professor, Environmental Law
Professor Dmitry Zadykhailo, Chief of Business Law Department
Tel: 0572-280014

ATTORNEYS

Collegium of Advocates
Victoria Gapvorouska
Yukhym Golyak
Alexander Maslov
Anatoly Suprun

JUDGES

Association of Judges
Anatoly Bookhan
Sergey Kamyshev, Chairman
Valeriy Karimonv, Executive Officer
Ludmila Shchebetun, Vice Chairman
Roundtable with 20 additional judges

Vasily Bryntsev, Chief Judge
Kharkiv Appellate Court
Tel: 0572-21-8565

Mykola I. Titov, Chairman
Kharkiv Appellate Commercial Court
Tel: 0572-43-39-41
email: arcourkr@online.kharkiv.com

NGOs

EcoPravo Kharkiv
Alexei Shumilo, Director
Inessa Shumilo, Lawyer
Serhiy Varlamov, Lawyer
Elena Vorfolomeeva, Accountant
Tel: 380-572-19-10-21
email: ams@ecopravo.kharkov.ua
web: www.ecopravo.kharkov.ua

Expert Consultation Center for Human Rights
Mykhaylo Buromensky
Oleksandr Serdyuk
Tel: 0572-140-367
www.hrlaw.org.ua

IN L'VIV

Ms. Zoreslava Romovska
MP, Professor
Tel.: (0322) 74-0080, (044) 291-7372

Dmytro Skrylnykov
EcoPravo – L'viv

Tel.: (0322) 722-746
Fax: (0322) 971-446

West Ukrainian Women's Perspectives Center
Ms. Halyna Fedkovych, Attorney/Trainer
Ms. Lyubov Maksymovych, Professional Skills Program Coordinator
Tel./Fax: (0322) 97-1829

Leonid Zosimov, Judge
L'viv Appellate Court
Tel: (0322) 75-40-24

IN TERNOPIIL

Bohdan Poshva, Judge
Ternopil Appellate Court
Tel: (0352) 25-4503

IN WASHINGTON

Adele Baker
Former Chief of Party
ABA/CEELI
Washington, DC

David Black
USAID
Washington, DC

Bohdan Futey (by telephone)
Court of Claims
Washington, DC
email: Bohdan_Futey@ao.uscourts.gov

Corbin Lyday
USAID
Washington, DC
Tel: 712-1711

Jim Michaels
GAO
Washington, DC
Tel: 512-5756

Steve Nix
International Republican Institute
Washington, DC
Tel: 202-408-9450, ext. 1
email: snix@iri.org

ANNEX C

UKRAINE RULE OF LAW ASSESSMENT DOCUMENTS REVIEWED

Reports and Statistics

ABA/CEELI Summary of Activities (1992 – 2000) and subsequent Quarterly Reports

ABA CEELI, Adele Baker, Liaison and Chief of Party, Final Report, December 14, 2001.

ARD/Checchi Final Report (September 1999)

Booze-Allen & Hamilton Commercial Legal Reform Assessments (December 1999)

Development Alternatives/Winrock International/Firma 2000, UNILOB S.C. and International Development Professionals, Inc, Alternative Credit Technologies. “BIZPRO: Business Information for Entrepreneurs and Consultants working in the SME sector and their Associations”, Various Articles, August, September, December 2001.

Canadian International Development Agency (CIDA), “A Path to Reform: Ukraine Programming Framework 2002-2006.” November 2001.

Dietrich, M., “Legal and Judicial Reform in Central Europe and the Former Soviet Union: Voices from Five Countries,” International Bank for Reconstruction and Development (World Bank) Legal Vice Presidency (2000).

Democratic Initiatives Foundation, “ Highlights of the November 2001 Public Opinion Poll”, with Ukrainian National Academy of Sciences Kiev. No date.

Democratic Initiatives Foundation, Ukrainian Society, 1994=2001: Results from Nationwide Surveys in Ukraine. With Ukrainian National Academy of Sciences Kiev. E-mail Version: December 10, 2001.

European Choice, “To Live in Europe-To Live by European Time”, Legislative Centre, European Choice, Kiev (2000).

B. Futey, “Comments on the Constitution of Ukraine,” 3 Parker Sch. J.E. Eur. L. 366 (1996)

B. Futey, “Comments on the Law on the Constitutional Court of Ukraine,” 10 The Harriman Review 15 (Spring 1997)

B. Futey, “The Prospects of the Judiciary Emerging as a Co-Equal Branch of Government in Ukraine,” Comments at the Ukrainian Free University, Munich, May 28 – 29, 1999.

B. Futey, “Upholding the Rule of Law in Ukraine: The Judiciary in Transition,” Towards a New Ukraine II (October 1998).

General Accounting Office (GAO). Former Soviet Union: U.S. Rule of Law Assistance Has Had Limited Impact (April 2001).

IFES Ukraine Surveys (1994 – 2001)

Institute of Applied Humanitarian Research: “Memorandum: Construction of a Greek-Catholic Temple in Kharkiv.” Expert Consultation Center in Human Rights, Kharkiv, Ukraine. Not dated.

Karatnycky, Adam. “Meltdown in Ukraine” Foreign Affairs (May/June 2001).

Law school curriculum provided by the Ministry of Education

MSI Evaluation of ACILS Programs (August 1999)

MSI Evaluation of CEELI Programs (January 1999)

MSI Report on Ukraine Rule of Law Achievements (Dietrich, September 2001)

MSI Ukraine Rule of Law Assessment and Strategy Recommendations (June 1999)

Nations in Transit (Freedom House, 2000 – 2001)

Organization for Security and Cooperation in Europe (OSCE), EcoPravo-Kyiv Environmental Law NGO. “Joint Bulletin.” No date, circa 2001.

OSCE Status of Projects (November 22, 2001)

C. Pascual and S. Pifer, “Ukraine’s Bid for a Decisive Place in History,” The Washington Quarterly, (Winter 2002)

Report on the Use of International Technical Assistance at the Rada (February 4, 1997)

Report on the Results of Cooperation Between the Higher Arbitration Court, USAID, and the Rule of Law Consortium, prepared by the Higher Commercial Court

Statistical data on caseload provided by the Kharkiv Oblast Court of General Jurisdiction

Statistical data on the caseload and numbers of judges in the Commercial Courts provided by the Higher Commercial Court

Statistical data provided by PDP on draft legislation considered and passed by the Rada
TACIS. CILC/HOME/PROJECTS/LIST: “Rule of Law Project Descriptions: Various.” Centre for International Legal Cooperation (2002).

USAID, Activity Fact Sheet: Rule of Law. Regional Mission for Ukraine, Belarus and Moldova (October 2001).

USAID, A Decade of Change: Profiles of USAID Assistance to Europe and Eurasia. Not Dated, c. 2001

USAID, “Brief Update on the Situation around the Draft Law ‘On Judiciary’”. Parliamentary Development Project for Ukraine, Memo (May 20, 2001).

USAID, SO 2.2 Presentation: PDP Accomplishments to Date. USAID/Ukraine Mission (December 2001).

USAID, Ukraine Political and Economic Update (December 2001).

US Association of Former Members of Congress, Internships in Verkhovna Rada and local administrations: Report”. With USAID/Kyiv and the Eurasia Foundation (1998).

U.S Department of State Report on Human Rights (February 2001)

U.S. Department of State Report on Human Rights (March 2002)

Ukraine, “Legal Framework Affecting Foreign Investment”, Trade Mission of Ukraine in the United States, NY District Office, The Consulate General of Ukraine. Summer 1996.

Ukraine: “Statistical Data from Constitutional Court of Ukraine: Status as of 02.01.2002.”

World Bank Assessment of Legal Reform Programs (Hammergren and Braginski, September 1998)

World Bank, Transition: The First Ten Years (The World Bank, Washington, D.C. 2002).

Legislation

The 1996 Constitution of Ukraine

Draft Law on the Judicial System of Ukraine

Criminal Code

Family Code

Labor Code

Civil Procedure Code

Criminal Procedure Code

Commercial Procedure Code

Law on the Constitutional Court of Ukraine

Judiciary Act No. 2022-X of June 5, 1981

Arbitration Court Act No. 1142-XII of June 4, 1991

Judicial Self-Governance Bodies Act No. 3909-XII of February 2, 1994

Status of Judges Act No. 2862-XII of December 15, 1992

Office of Public Prosecutor Act No. 1789-XII of November 5, 1991

Constitutional Court Ruling in Matter No. 1-1/99 of April 8, 1999

1992 National Budget Act No. 2477-XII of June 18, 1992

1993 National Budget Act No. 3091-XII of April 3, 1993

1994 National Budget Act No. 3898-XII of February 1, 1994

1995 National Budget Act No. 126/95-VR of April 6, 1995
1996 National Budget Act No. 96/96-VR of March 22, 1996
1997 National Budget Act No. 404/97-VR of June 27, 1997
1998 National Budget Act No. 796/97-VR of December 30, 1997
1999 National Budget Act No. 378-XIV of December 31, 1998
2000 National Budget Act No. 1458-III of February 17, 2000
2001 National Budget Act No. 2120-III of December 07, 2000
2002 National Budget Act No. 2905-14 of December 20, 2001

ANNEX D

MEMORANDUM

DATE: February 18, 2002
TO: Mark Dietrich, Richard Blue
FROM: Vitalii Kravchenko
SUBJECT: Judicial Reform In Ukraine

BACKGROUND

The Constitution of Ukraine of June 28, 1996 (“the Constitution”) required that a new system of courts of general jurisdiction be established within five years from the date of its adoption. The Parliament of Ukraine (“the Rada”) has failed to agree on a concept of judicial reform. Thus, it could not pass a new Judiciary Act within the constitutionally established time period. To avoid a collapse of the judiciary and an overall paralysis of the legal system of Ukraine, on June 21, 2001 the Rada succeeded in passing a number of bills, which provided for amendments to the existing legislation. Namely, the Rada passed ten bills, among which were the Bill introducing amendments to the Judiciary Act No. 2022-X of June 5, 1981; the Bill introducing amendments to the Arbitration Court Act No. 1142-XII of June 4, 1991; the Bill introducing amendments to the Judicial Self-Governance Bodies Act No. 3909-XII of February 2, 1994; the Bill introducing amendments to the Judges Qualification Commissions, Attestation and Responsibility Act No. 3911-XII of February 2, 1994; the Bill introducing amendments to the Status of Judges Act No. 2862-XII of December 15, 1992; the Bill introducing amendments to the Office of the Public Prosecutor Act No. 1789-XII of November 5, 1991, etc. The President of Ukraine vetoed the latter bill, but the Rada, after having made certain changes to the final draft, passed it again on July 12, 2001. Also, the Rada passed some amendments to a number of procedure codes.⁴⁴

The restructuring of the judicial system of Ukraine, which occurred in 2001, is considered to be a part of the “*small*” judicial reform. This reform was implemented for the purpose of satisfying the requirements set forth in the Constitution. However, only the minimum amendments were introduced to the relevant legislation of Ukraine. The system of administration of justice has not fundamentally changed.

Court System

(A) OUTLINE OF THE COURT SYSTEM PRIOR TO THE SMALL JUDICIAL REFORM

COURTS OF GENERAL JURISDICTION

Prior to the small judicial reform, according to Art. 20 of the Judiciary Act, the system of courts of general jurisdiction was comprised of the following: the Supreme Court of Ukraine, the Supreme Court of the Autonomous Republic of Crimea, oblast courts, the Kyiv and Sevastopol city courts, inter-oblast courts, inter-district courts, district (city) courts, and the military courts for the Armed Forces and the Navy of Ukraine.

⁴⁴ All legislation referred to herein is available in Ukrainian language. Should there be a necessity to consult these statutes, please feel free to contact the author of this memorandum via email at kravchenko@iatp.kiev.ua

District (city) courts were placed at the bottom of the hierarchy. In other words, in the system of courts of general jurisdiction, they acted as lower courts (first instance courts). They were to examine all civil and criminal matters, and also the matters concerning administrative misdemeanors. According to Art. 22 of the Judiciary Act, the judges of the district courts were to be elected by the local councils for ten years. The judges elected for the first time could serve in their positions for five years.

According to Art. 21-1 of the Judiciary Act, inter-district courts were to be established for the purpose of holding court hearings before a panel of three judges in case where such panel could not be formed at the level of district courts. Inter-district courts were to be established by the Rada. The panels were to be formed from the judges sitting on the district (city) courts.

According to Art. 31-1 of the Judiciary Act, inter-oblast courts were to act as first instance courts at certain establishments/plants set up within the territory of Ukraine, which were subject to special rules and regulations. Inter-oblast courts were to examine civil and criminal matters, and also the matters concerning administrative misdemeanors. They were to be formed by the Rada. The judges of the inter-oblast courts were to be elected by the Rada for ten years. Lay judges of such courts were to be elected by the Rada for five years, at a submission made to this effect by the chief judge of each inter-oblast court.

According to Articles 29, 31 of the Judiciary Act, the Supreme Court of the Autonomous Republic of Crimea, oblast courts and the Kyiv and Sevastopol city courts were to (1) in cases prescribed by the law, examine as first instance court the matters brought before them; (2) act as cassation courts for the judgments and rulings rendered by lower courts; (3) review judgments rendered by lower courts in conjunction with newly discovered circumstances and; (4) oversee the administration of justice performed by lower courts. The judges of these courts were to be elected by the Rada for ten years. Lay judges of these courts were to be elected by the local councils for five years.

According to Art. 31-1 of the Judiciary Act, the military courts were to administer justice in the Armed Forces of Ukraine as well as in any other military formations, established pursuant to the legislation of Ukraine. According to Art. 38-3 of the Judiciary Act, the judges of military courts were to be elected by the Rada for ten years. The judges elected for the first time could serve in their positions for five years.

According to Art. 39 of the Judiciary Act, the Supreme Court of Ukraine was the court of highest instance among the courts of general jurisdiction. Pursuant to Art. 40 of the Judiciary Act, the Supreme Court was to (1) in cases prescribed by the law, examine as first instance court the matters brought before it; (2) act as cassation court for the judgments and rulings rendered by lower courts; (3) review judgments rendered by the lower courts in conjunction with newly discovered circumstances; (4) oversee the administration of justice performed by lower courts. The Supreme Court of Ukraine was to examine and generalize the judicial practice and analyze statistical information it received from lower courts. The judges and lay judges of the Supreme Court were to be elected by the Rada for ten years.

ARBITRATION COURTS

Apart from the system of courts of general jurisdiction, a separate system of arbitration courts was established in Ukraine in 1991. According to Art. 1 of the Arbitration Courts Act No. 1142-XII of June 4, 1991, in commercial relations, the administration of justice was to be performed by arbitration courts. At first, arbitration courts were in charge of resolution of all commercial disputes, arising between legal entities, state bodies and other institutions. In 1997, the legislature granted arbitration courts with the power to examine bankruptcies.

Prior to the small judicial reform, according to Art. 5 of the Arbitration Courts Act, the system of arbitration courts was comprised of the following: the Higher Arbitration Court of Ukraine, the Higher Arbitration Court of the Autonomous Republic of Crimea, oblast arbitration courts, the Kyiv and Sevastopol city arbitration courts. The Higher Arbitration Court was a court of appeals for the judgments and rulings rendered by lower arbitration courts. All other arbitration courts were to act as first instance courts. In other words, they were to examine all commercial disputes and bankruptcy matters at the grassroots level.

(B) OUTLINE OF THE COURT SYSTEM AFTER THE SMALL JUDICIAL REFORM

According to Art. 20 of the Judiciary Act, as amended, the system of courts of general jurisdiction shall be comprised of the local courts (*formerly district (city) courts, oblast arbitration courts, the Kyiv and Sevastopol city arbitration courts*), appellate courts (*formerly the Supreme Court of the Autonomous Republic of Crimea, oblast courts, the Kyiv and Sevastopol city courts, also the newly established seven commercial courts of appeal*), higher specialized courts and the Supreme Court of Ukraine.

According to Art. 25 of the Judiciary Act, as amended, local courts shall function as first instance courts and shall examine civil, criminal and commercial matters. Where prescribed by law, they shall also examine the matters concerning administrative misdemeanors. Apart from examining matters as first instance courts, local courts shall also examine civil, criminal, commercial and administrative matters in conjunction with newly discovered circumstances.

Pursuant to Art. 31 of the Judiciary Act, as amended, appellate courts shall (1) function as courts of the appellate jurisdiction for judgments and rulings rendered by the local courts; (2) act as first instance courts in administrative, criminal and civil matters, which shall come under their jurisdiction according to the law; (3) review cases in conjunction with newly discovered circumstances.

Articles 35, 36 of the amended Judiciary Act requires that court chambers be formed in appellate courts, instead of collegiums, which used to operate in oblast courts. Chief judges of the appellate courts shall have the authority to assign judges from one chamber to examine the matters, which come under the jurisdiction of another chamber, or a court of other instance.

The system of commercial courts was integrated into the system of courts of general jurisdiction. However, the hierarchy in the system of arbitration courts had been preserved almost intact. The courts have changed their name from “arbitration courts” to “commercial courts.” As a result of the small judicial reform, a system of appellate commercial courts shall be established. There shall be seven appellate commercial courts, functioning throughout Ukraine; however, the process of their establishment had been completed yet.

As a result of the small judicial reform, the functioning of the military courts remained virtually unchanged. Pursuant to Art. 38-1 of Judiciary Act, as amended, the military courts shall administer justice in the Armed Forces of Ukraine as well as in any other military formations, established pursuant to the legislation of Ukraine. According to Art. 38-3 of the Judiciary Act, as amended, the Rada shall elect the judges of the military courts for life tenure. The President of Ukraine shall first appoint the judges of the military court for a five-year probationary term. That appears to be the only significant change.

The Judiciary Act, as amended, provides for the functioning of higher specialized courts, which, pursuant to Art. 38-15 of the Judiciary Act, as amended, shall (1) act as cassation courts for judgments and rulings rendered by the local and appellate specialized courts; (2) review cases in conjunction with newly discovered circumstances; (3) in cases where required by law, they shall act as courts of appeal for

judgments and rulings rendered by the appellate courts, should the latter have examined the appealed matters as first instance courts.

The system of specialized courts has not been fully established yet. Commercial courts form an element of the system of specialized courts. Some experts say that there is a need to establish a system of administrative courts in Ukraine. Other experts say that there is a need to establish specialized courts, which would examine matters related to protection of intellectual property rights. Therefore, it is not clear yet what specialized courts would function in Ukraine. However, all specialized courts, including commercial courts, are integrated into the system of courts of general jurisdiction.

In the course of the small judicial reform, the status of the Supreme Court of Ukraine has not changed much, although a number of cosmetic changes had been made thereto. Substantive changes as to the authority of the Supreme Court have been made through amendments introduced to numerous procedure codes.

According to Art. 45 of the Judiciary Act, as amended, the Supreme Court was deprived of the right of legislative initiative, which the Plenum of the Supreme Court used to be vested with. Now, the Plenum can only submit written requests to the Constitutional Court of Ukraine asking the latter to review the constitutionality of laws and regulations and/or to provide the official interpretation of constitutional provisions. It appears, however, that in a democratic society, the judicial branch of the government shall have the authority to submit legislative proposals to the legislature.

Art. 8 of the Judiciary Act, as amended, provides that the President of Ukraine shall have the authority to establish the courts of general jurisdiction upon a submission made to this effect by the Chief Justice of the Supreme Court, or by the chief judge of a higher specialized court, or by the Minister of Justice. Prior to the small judicial reform, Art. 8 used to provide that all courts in Ukraine shall be formed based upon the principle of appointment by election of professional judges and lay judges.

In the course of the small judicial reform, some important changes have been made in terms of recruitment of new judges. Pursuant to Art. 24 of the Judiciary Act, as amended, the President of Ukraine shall establish the number of judges in each local court upon a submission made to this effect by the Chief Justice of the Supreme Court, or by the chief judge of a higher specialized court, or the Minister of Justice. Prior to the small judicial reform the authority to define the number of judges in each local court belonged to the Rada, not the President.

The procedure set for appointment of judges to the courts at different levels has changed significantly. According to Art. 22 of the Judiciary Act, as amended, the judges of the local courts shall be first appointed by the President of Ukraine for a five-year probationary term. After expiration of this probationary term, the Rada may elect the judges for life tenure. According to Art. 30 of the Judiciary Act, as amended, the same procedure applies to appointment of judges to appellate courts.

According to Art. 38-13 of the Judiciary Act, as amended, the Rada shall elect the judges of higher specialized courts. According to Art. 41 of this Act, the Rada shall elect the justices of the Supreme Court of Ukraine for life tenure.

The law is silent about selection of jurors and does not set out detailed provisions with regard to appointment of the lay judges. Pursuant to Art. 30 of the Judiciary Act, as amended, local councils at the oblast level shall elect the lay judges for a five-year term upon a submission made to this effect by the chief judge of a respective appellate court. However, it seems that administrators of the appellate courts have problems finding a required number of lay judges to sit on their courts.

Conclusion

The main outcome of the small judicial reform is the introduction of the new appeal and modified cassation procedures. As a result of the integration of the system of arbitration (commercial) courts into the system of courts of general jurisdiction, a uniform system of the courts of general jurisdiction has been established in Ukraine.

In terms of observance of individual liberties and human rights, major changes have been made to the procedure of taking into custody (arrest) and detention of an individual suspected of committing a crime. Also, important changes have been made to the procedure of inspection and search of the abode of an individual or of any other private property. However, these issues are not the subject matter of this research.

On February 7, 2002, the Rada passed a new comprehensive Judiciary Act. However, the President has not signed this new bill yet, therefore, it has not come into effect. It seems now that the legislature is facing the major challenge of passing a series of the new procedure codes, which are necessary to fully implement the judicial reform in Ukraine. Anyway, there are numerous changes still to come for the judiciary in Ukraine.

ANNEX E

MEMORANDUM

DATE: April 9, 2002
TO: Mark Dietrich, Chad Hespell
FROM: Vitalii Kravchenko
SUBJECT: Budget Allocations for the Judiciary in Ukraine

Budget Allocations for the Judiciary in Ukraine

Note: From 1991 till 1996, the Ukrainian Karbovanets (“UK”) used to be a legal tender in Ukraine. Inflation was very high during that period. All figures in the chart below are given in UK and converted into U.S. Dollars (*bold red italics*). The official average exchange rate was used for the purpose of conversion. This average exchange rate was set by the National Bank of Ukraine and published at www.bank.org.ua. No data is available for the year 1991.

Abbreviations: “mn” stands for “million”
“bn” stands for “billion”
“N/A” stands for “no data is available”

Year:	Judiciary Total	Supreme Court	Constitutional Court	Arbitration Courts	District & Oblast Courts	National Budget Revenues	National Budget Expenditures	National Budget Deficit
1992 Ex. Rate: \$1:UK208	2,274.8mn \$10,936,538.46	N/A	N/A	N/A	N/A	657,752.3mn \$3,162,270,673.07	684,471.2mn \$3,290,726,923.07	26,718.9mn \$128,456,250
1993 Ex. Rate: \$1:UK4539	22,496.5mn \$4,956,267.90	N/A	N/A	N/A	N/A	4,632,428.6mn \$1,020,538,520.56	5,615,726.7mn \$1,234,496,966.37	Max 983,298.1mn \$216,633,201.14
1994 Ex. Rate: \$1:UK31700	593,155.8mn \$18,711,539.43	N/A	N/A	N/A	N/A	350,844,534.4mn \$11,067,650,927.44	468,103,556.3mn \$14,766,673,700.31	Max. 117,259,021.9mn \$3,699,022,772.87
1995 Ex. Rate: \$1:UK147307	4,049,000mn \$27,486,813.25	N/A	N/A	N/A	N/A	1,441,126,618.5mn \$9,783,150,960.24	1,772,693,593.4mn \$12,034,007,843.48	Max 331,566,974.9mn \$2,250,856,883.24
1996*	8,530bn \$46,624,760.86	920bn \$5,028,696.36	N/A	1,081bn \$5,908,718.23	11,123bn \$60,798,032.25	2,390,864.7bn \$13,068,405,028.70	2,852,610.1bn \$15,592,293,522.82	461,745.4bn \$2,523,888,494.12

* In 1996, the Ukrainian Hryvna (UAH) was introduced as a legal tender in Ukraine. The exchange rate was UK100,000: UAH1. However, the figures that appear in the 1996 National Budget Act were stated in UK. The official exchange rate set by the National Bank of Ukraine for 1996 was \$100:UAH182.95. I used the following formula for the conversion of the figures in UK into U.S. Dollars, according to the official exchange rate: X amount in UK/100,000/1.8295=Y amount in \$U.S., where UK100,000:UAH1, and \$1:UAH1.8295

It appears though that the figures for 1996 must be dealt with caution. Due to high exchange rates set by the National Bank of Ukraine for the newly introduced Hryvna, it appears that in 1996 the budget for the judiciary, as well as other budgets, was real big. However, I assume that taking into account the inflation, the budget for the judiciary was not much different from the ones designated for previous years.

Note: All figures in the chart below are given in Ukrainian Hryvna and converted into U.S. Dollars.

Abbreviations: “thsd” stands for “thousand”
 “N/A” stands for “no data is available”

Year:	Judiciary Total	Supreme Court	Constitutional Court	Higher Arbitration Court	Arbitration Courts	Military Courts	Oblast & District Courts	National Budget Revenues	National Budget Expenditures	National Budget Deficit
1997 Ex. Rate: \$1:UAH1.8617	95,200thsd <i>\$51,136,058.4</i> <i>4</i>	9,000thsd <i>\$4,834,291.2</i> <i>3</i>	6,000thsd <i>\$3,222,860.8</i> <i>3</i>	1,400thsd <i>\$752,000.86</i>	N/A	2,100thsd <i>\$1,128,001.2</i> <i>9</i>	N/A	21,660,253.5thsd <i>\$11,634,663,748.1</i> <i>9</i>	27,411,474.5thsd <i>\$14,723,894,558.7</i> <i>4</i>	Max 5,751,221thsd <i>\$3,089,230,810.55</i>
1998 Ex. Rate: \$1:UAH2.4495	112,995thsd <i>\$46,129,822.4</i> <i>1</i>	9,000thsd <i>\$3,674,219.2</i> <i>3</i>	20,429thsd <i>\$8,340,069.4</i> <i>0</i>	1,766thsd <i>\$720,963.46</i>	7,019thsd <i>\$2,865,482.7</i> <i>5</i>	1,900thsd <i>\$775,668.50</i>	72,881thsd <i>\$29,753,419.06</i>	21,101,050.9thsd <i>\$8,614,431,884.06</i>	24,481,773.9thsd <i>\$9,994,600,489.89</i>	Max 3,380,723thsd <i>\$1,380,168,605.83</i>
1999* Ex. Rate: \$1:UAH4.1304	132,000thsd <i>\$31,958,163.8</i> <i>6</i>	14,215thsd \$3,441,555.3	12,170thsd <i>\$2,946,445.8</i> <i>6</i>	3,050thsd <i>\$738,427.27</i>	13,780thsd <i>\$3,336,238.6</i> <i>2</i>	3,970thsd <i>\$961,165.99</i>	81,890thsd <i>\$19,826,166.96</i>	23,895,260.8thsd <i>\$5,785,217,121.83</i>	25,135,260.8thsd <i>\$6,085,430,176.25</i>	Max 1,240,000thsd <i>\$300,213,054.42</i>
2000** Ex. Rate: \$1:UAH5.4402	195,221thsd <i>\$35,884,893.9</i> <i>4</i>	13,123.3thsd <i>\$2,412,282.6</i> <i>4</i>	16,512.6thsd <i>\$3,035,292.8</i> <i>2</i>	6,616.9thsd <i>\$1,216,297.1</i> <i>9</i>	26,398.6thsd <i>\$4,852,505.4</i> <i>2</i>	5,372.2thsd <i>\$987,500.46</i>	124,728.1thsd <i>\$22,927,116.65</i>	33,946,526.9thsd <i>\$6,239,940,976.43</i>	33,946,526.9thsd <i>\$6,239,940,976.43</i>	0
2001*** Ex. Rate: \$1:UAH5.3721	280,155.6thsd <i>\$52,150,108.8</i> <i>9</i>	17,787.7thsd <i>\$3,310,509.7</i> <i>6</i>	27,328.5thsd <i>\$5,087,116.7</i> <i>7</i>	11,118.2thsd <i>\$2,069,618.9</i> <i>6</i>	42,151thsd <i>\$7,846,279.8</i> <i>5</i>	5,612.5thsd <i>\$1,044,749.7</i> <i>2</i>	156,634.6thsd <i>\$29,157,052.18</i>	41,961,066.9thsd <i>\$7,810,924,387.11</i>	41,961,066.9thsd <i>\$7,810,924,387.11</i>	0

* In 1999, UAH 2,925thsd (*\$708,163.86*) was allocated from the national budget to the Supreme Council of Justice. This figure is not reflected in the chart above, but is included into the total.

** In 2000, UAH 2,469.3thsd (*\$453,898.75*) was allocated from the national budget to the Supreme Council of Justice. This figure is not reflected in the chart above, but is included into the total.

*** In 2001, UAH 2,583.6thsd (**\$480,929.24**) was allocated from the national budget to the Supreme Council of Justice. This figure is not reflected in the chart above, but is included into the total. Also, in 2001, UAH 16,939.5thsd (**\$3,153,236.16**) was allocated for the judicial reform. This figure is included into the total.

Year:	Judiciary Total**	Supreme Court	Constitutional Court	Higher Commercial Court	Appellate Commercial Courts	Local Commercial Courts	Military Courts	Local Courts (formerly, district courts)	Appellate Courts	National Budget Revenues	National Budget Expenditures	National Budget Deficit
2002*	429,744.4thsd	23,527.5thsd	17,667.0thsd	10,108.5thsd	40,183.8thsd	54,538.8thsd	6,214.7thsd	147,093.0thsd	37,407.5thsd	45,390,509.5thsd	49,573,467.3thsd	Max 4,182,957.8thsd
Ex. Rate: \$1:UAH5.32	<i>\$80,779,022.56</i>	<i>\$4,422,462.41</i>	<i>\$3,320,864.66</i>	<i>\$1,900,093.98</i>	<i>\$7,553,345.86</i>	<i>\$10,251,654.13</i>	<i>\$1,168,176.69</i>	<i>\$27,649,060.15</i>	<i>\$7,031,484.96</i>	<i>\$8,532,050,657.89</i>	<i>\$9,318,320,921.05</i>	<i>\$786,270,263.16</i>

* The exchange rate applied to 2002 is not the official rate set by the National Bank of Ukraine. It is an average calculated based on official exchange rates for each month beginning January 1, 2002. As of January 1, the official exchange rate was \$100:UAH529.85. As of February 1, it was \$100:UAH532.10. As of March 1, it was \$100:UAH532.21. As of April 6, it was \$100:UAH532.76. As of April 9, 2002, the inflation in Ukraine is about 5% per year, which is the lowest level in the history of Ukraine, since the country regained independence in 1991.

** In 2002, UAH 2,774.0thsd (*\$521,428.57*) was allocated from the national budget to the Supreme Council of Justice. This figure is not reflected in the chart above, but is included into the total. Also, in 2002, UAH 90,229.6thsd (*\$16,960,451.13*) was allocated for the judicial reform. This figure is included into the total.